No. 1041 3[redacted]55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

LOUIS B. MACKENZIE, - - - Petitioner,

versus

A. ENGELHARD & SONS CO., - Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the

United States Circuit Court of Appeals

For the Sixth Circuit

AND

BRIEF IN SUPPORT THEREOF.

Where a judicial foreclosure sale has been had pursuant to a decree of a State Court, having jurisdiction of the persons of the parties, it is not competent for a Federal Court, in equity, to refuse to enforce the purchaser's rights acquired at such sale, because it thinks the State Court's action was inequitable.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

A copy of the within Petition for Certiorari and Brief in support thereof, together with a notice that the Petition will be submitted to the Supreme Court of the United States on May 6, 1923, is hereby acknowledged this April 15, 1923.

R. A. McDowell,
Counsel for Respondent.

INDEX.

	PAGE
Petition for a Writ of Certiorari	1
Brief in support of Petition for Certiorari	8

IN THE

Supreme Court of the United States

October Term, 1922.

LOUIS B. MACKENZIE, - - - *Petitioner,*

vs.

A. ENGELHARD & SONS CO., - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, LOUIS B. MACKENZIE, respectfully petitions for a Writ of Certiorari to review a judgment of the United States Circuit Court of Appeals for the Sixth Circuit, covering both an appeal and a cross-appeal to that Court and which presents a case quite analogous to, and much stronger than, that in which a *certiorari* was granted in *Yazoo & M. V. R. Co.* v. *Clarksdale,* 257 U. S. 10.

The facts are simple and are all stipulated (R. 19).

GENERAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

I. *The necessity of avoiding conflict between the State and Federal Courts and requiring each to respect the judgments of the other.*

1. A State Court having jurisdiction of the person of the defendant, and acting pursuant to the mandate of the highest Court of the State, entered a final decree, giving Mackenzie a judgment against Eschmann on a plain promissory note, and ordering a sale at public auction of 130 shares of stock in order to foreclose a $10,000 lien therein adjudged on the stock, which Eschmann had pledged to secure the payment of the note sued on (R. 36); the public judicial sale was had and Mackenzie bought the stock in for $100;* the sale was confirmed, no exceptions were filed nor any appeal taken, and a Bill of Sale conveying the stock to Mackenzie was executed, approved by the Court, and delivered to Mackenzie as purchaser (R. 25, 38). This gave Mackenzie an unassailable title to the stock (*Yazoo & M. V. R. R. Co.* v. *Clarksdale,* 257 U. S. 10, 26).

*The nominal price realized at the sale did not result from any accident or unfairness or lack of notice; but it arose from the fact that the defendant-debtor, Eschmann, and the corporation, Engelhard Co., through their attorney, publicly notified all prospective bidders at the judicial sale that the certificate for 130 shares of stock about to be sold, had been cancelled, was no longer in existence, and hence valueless. That announcement was made by them pursuant to a carefully thought-out plan designed to prevent any one else from bidding the stock in, and in order to compel the plaintiff, Mackenzie, to become the purchaser, in the belief on the part of Eschmann that they could later nullify Mackenzie's rights as purchaser (R. 24-25, 7, 9).

2. Mackenzie then filed a Bill in Equity in a Federal Court to compel the corporation, Engelhard Co., respondent herein, (1) to issue him a certificate of stock for the 130 shares so purchased or, in the alternative, (2) to pay him the value of the stock and such dividends, stipulated to be about $23,000 (R. 1-5).

3. The Circuit Court of Appeals held that the action of the State Court (1) in decreeing a sale and (2) in confirming the sale made thereunder [without Mackenzie bringing the corporation in as a party to the suit, *the very thing which Mackenzie had, in the first instance, actually done, and which the State Court, at the corporation's own instance, had decided was improper and dismissed it from the litigation*] produced "a grossly inequitable result"; because it permitted Mackenzie not only to own the stock, but after crediting on his debt the $100 paid, left the balance of his claim unimpaired against the judgment-debtor (R. 58); and that the Federal Court, sitting *in equity* (as distinguished from law), had the right to deny to the purchaser some of his legal rights acquired under the State Court's judgment, as a condition of granting him any relief in equity, even though such relief was nothing but a pure money judgment in the nature of damages (R. 57, 59).

Accordingly, the Circuit Court of Appeals declined to recognize or to enforce Mackenzie's rights as the owner of the stock purchased at the

judicial sale; but held that as the corporation, with full knowledge of Mackenzie's claim to a lien as pledgee of the stock, had, at the pledgor's request, during the pendency of the litigation, and before the decree of sale, transferred the stock, *pendente lite,* to the pledgor's wife and attorney (neither of whom were purchasers without notice), the corporation had wronged Mackenzie and was liable to him, but (*a*) not for the *stock itself,* nor (*b*) in damages for the *value* of the stock he had purchased, nor (*c*) for the *dividends* declared thereon after the purchase, but (*d*) only for the original amount of Eschmann's note, with interest, and a part of the costs of the State Court suit—something with which the corporation had no concern and which had been merged in the State Court judgment (R. 59).

It is unnecessary here to consider the erroneous propositions announced by the Circuit Court of Appeals without citation of authority, in order to support its conclusions.

It is sufficient to point out that, if its decision is right, then, whenever a Federal Court shall foreclose a railroad mortgage, sell the property, and by deed convey it to a purchaser, who, desiring to enforce some equitable right arising from the fact of his ownership under such foreclosure decree, brings a suit in a State Court, it leaves the State Court free (under the doctrine now announced) to hold that the Federal foreclosure

sale produced "a grossly inequitable result," and to substitute its own views as to what it will give to the purchaser (admittedly less than his rights under the purchase) as a substitute for the rights established by the Federal decree.

The Federal Court, in effect, denied the full faith and credit to the State Court judgment, which by statute it is required to accord (R. S. 905; *Cooper* v. *Newell,* 173 U. S. 555, 567).

It is highly important that in a case of first impression like this, this Court should determine, as a rule for future guidance, how far a Federal Court (because it thinks a State Court judgment produced an "inequitable result"), can set up its individual ideas of what constitutes an "equitable result," and can compel a litigant to accept such modified rights, instead of receiving full Federal relief based upon a final decree of a State Court.

In *Yazoo* v. *M. V. R. Co.* v. *Clarksdale,* 257 U. S. 10, there was a sale of 250 shares of railroad stock under an execution issued on a Federal Court judgment. Subsequently a State Court, sitting in equity, held that it would compel the purchaser at the Federal Court sale to give up that which it had obtained at the sale and to recognize the original defendant as the owner of the stock. A *certiorari* was issued to the highest Court of the State.

Here the situation is slightly reversed. The sale took place not under an execution, but at a

regular judicial sale confirmed by the State Court itself; and it was a Federal Court, in equity, which denied the purchaser title to the stock, although it did give him partial relief in damages.

II. *The Novelty of the Question. The view taken by the Circuit Court of Appeals is a novel one, indeed so novel that no authority exists on the subject.* Its opinion does not cite a single authority in support of its position, but admitted the novelty of its conclusion, saying (R. 59):

> "We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules."

III. *The Importance of the Question Involved.* A large part of the wealth of the country is represented by corporate stock. Transactions in it are daily and enormous. The pledging of corporate stock for debts is probably the most widespread form of pledge now made.

If a Court having personal jurisdiction of the pledger and pledgee, decrees the sale of corporate stock to satisfy a lien therein adjudged, and a sale thereunder is had, confirmed and a Deed or Bill of Sale given to the purchaser, is it the law that a Court of another jurisdiction, because it does not approve of the first tribunal's judgment, is free under alleged principles of equity jurisprudence, to decline to enforce the

purchaser's rights and arbitrarily *to award him something less,* in order to compensate for the Court's difference of opinion as to the propriety of the first Court's judicial action?

If such is the law, then State Courts will have just as much right to refuse to enforce the supposed inequitable results of Federal decrees, as in the present case a Federal Court has exercised that right with respect to a State Court decree.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

April 15, 1923.

STATE OF KENTUCKY,
COUNTY OF JEFFERSON. }

William Marshall Bullitt, being first duly sworn, says that he is Counsel for Louis B. Mackenzie, Petitioner; that he has read the foregoing Petition for Certiorari; and that the statements contained therein are true.

WM. MARSHALL BULLITT.

Subscribed and sworn to before me by William Marshall Bullitt this 15th day of April, 1923.

M. L. WIEST,
Notary Public, Jefferson Co., Ky.

[See the next page for a short Brief in support of this Petition.]

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1. *The State Court Suit.* Mackenzie, pledgee, sued Eschmann, pledgor, in a Kentucky State Court to recover on a $7,500 note and to foreclose a lien on 130 shares of stock in the Engelhard Co. (worth about $17,000) which Eschmann had pledged as collateral security on his note (R. 20).

The *lower* State Court dismissed Mackenzie's suit, took the pledged certificate away from him and delivered it back to the pledgor, Eschmann (R. 22, 30), who (pending Mackenzie's appeal) procured the Engelhard Co. (which was a "family" corporation and had actual knowledge of the pendency of Mackenzie's claim), to cancel the certificate and to reissue the 130 shares in new certificates to Eschmann's wife and attorney, neither of whom were purchasers without notice (R. 22, 23, 56); this was done in the belief that it would destroy Mackenzie's lien on the stock and defeat his claim thereto, if the case should be reversed (R. 42).

The Court of Appeals of Kentucky *reversed* the case (R. 23-24, 31-36); and, pursuant to its direct mandate, the State Court ordered that the pledged certificate be returned to the Court (which was never obeyed as Eschmann had in the meantime died) and that the 130 shares of stock be sold to satisfy the $10,000 lien adjudged thereon in favor of Mackenzie (R. 24, 36), who,

at such public judicial sale, bought in the stock for $100* (R. 25).

The sale was duly confirmed by the State Court and a judicial deed or bill of sale, transferring and conveying the stock to Mackenzie, was ordered (R. 25); it was duly executed and approved by the Court and was delivered to Mackenzie (R. 25, 38). Mackenzie then presented such Bill of Sale to the Engelhard Co., and demanded that it issue to him a certificate for 130 shares. The Engelhard Co. refused to do so (R. 25).

2. *The Federal Court Suit.* Mackenzie (following the precise course approved in *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, and *Telegraph Co.* v. *Davenport*, 97 U. S. 369) brought an equity suit in the Federal Court against the Engelhard Co. to compel it to issue to him a certificate for 130 shares of stock, or, in the alternative, to pay him the value thereof and the dividends thereon since his purchase at the judicial sale (R. 1-5).

The Engelhard Co. defended upon the ground that as Mackenzie had not superseded the original judgment in the State Court, the Engelhard Co. had (while the judgment remained unreversed) transferred the stock to Eschmann's wife and attorney; that they were now stockholders in the company, which could not lawfully overissue its stock; and hence, that Mackenzie

---

*See p. 2, Note, *supra*, for an explanation of the nominal sum at which the stock sold.

had no claim against the corporation for the stock (R. 9, 15).

The DISTRICT COURT held that the Engelhard Co. had *wrongfully* transferred the stock with full knowledge of Mackenzie's pending claim thereto, but it refused to recognize Mackenzie's rights *as owner* through his purchase at the judicial sale; and quite illogically, as it seems to us, gave Mackenzie a judgment in damages against the Engelhard Co., not for the value of the stock, but for (1) the $7,500 note, with interest, and (2) the dividend paid on the stock after the judicial sale—the total judgment amounting to about $15,000 at the present time.

Both parties appealed; Mackenzie seeking to recover for the stock itself or, at least, its stipulated value of $23,000 (R. 47); the Engelhard Co. seeking to avoid all liability whatever (R. 48).

3. *The Decision Complained of.* The CIRCUIT COURT OF APPEALS held:

> (1) That the Engelhard Co. had wrongfully transferred the stock with knowledge of Mackenzie's rights and that if Mackenzie had sued the Engelhard Co. *at law,* he could have recovered full damages from it, *i. e.,* $23,000 (R. 57).
>
> (2) But that as Mackenzie sued *in equity* to recover the stock, the Federal Court had the right to make any relief granted (even though such relief be not the specific delivery of the stock, but nothing but a *pure money judgment* in damages)

"contingent upon plaintiff's acceptance of less than full legal rights" (R. 57, 59); and hence,

(3) That as the Court felt it was "grossly inequitable" for the State Court to have confirmed a sale of $17,000 of stock for $100 —notwithstanding the fact that all parties were present at the sale and that the small price bid was due to the announcement by the authorized attorney of the Eschmann and Engelhard interests, that the sale would carry no title to the thing sold, and to which sale no exceptions were filed nor appeal taken—it would reverse even the District Court's inadequate decree in Mackenzie's favor, and *reduce* the judgment to his original debt and interest (with "the costs of the State Court proceedings up to the time of the decree of the trial court directing a sale, but not thereafter") [R. 58, 59].

It is not necessary here to restate the grounds urged in the Petition for the Writ of Certiorari why this is the kind of a case in which a Certiorari should be granted, but it may be helpful to the Court to have a short

ANALYSIS OF THE OPINION OF THE CIRCUIT COURT OF APPEALS.

I. The Circuit Court of Appeals correctly assumed that Mackenzie acquired the legal title to the stock at the judicial sale and that "in an action *at law* against the corporation for its refusal to reissue the stock to him he would be entitled to recover *full* damages," but the Court *erroneously* holds that as Mackenzie sued the

corporation *in equity*, he cannot recover either the stock or full damages, because of what might be termed Mackenzie's *contributory negligence*, which it expressed in the following words (R. 57):

> "On the contrary, while Mackenzie did not directly acquiesce in the withdrawal of the certificates, he *contributed* to create the situation attending the withdrawal, surrender and reissue. To obtain a *supersedeas* would apparently have been no burden and would have avoided all later complications; and while it may be assumed that the lien upon the stock was in law reinstated *ab initio* when the judgment was reversed, yet the intermediate transfer and reissue would not have occurred if Mackenzie had taken the customary precautions to preserve his interests."

COMMENT: If Mackenzie did not wish to give a *supersedeas* bond, he was absolutely within his rights; and his failure to supersede cannot properly be made the basis by the Federal Court of a refusal to enforce his rights accorded him by the highest Court of the State in reversing the erroneous judgment.

II. The Circuit Court of Appeals held that the wrong done to Mackenzie by the Engelhard Co. in issuing the stock to other persons, pending the appeal, did not wrong Mackenzie (R. 58),

> "to the entire value of the stock, since Mackenzie had therein no interest to be injured except to the extent of his lien."

COMMENT: But the Court of Appeals overlooks the fact that Mackenzie's lien might, if not paid, ripen by its enforcement into the ownership of the entire stock; and that the Engelhard Co.'s wrongful act, if it *deprived* Mackenzie of the complete enforcement of his lien into ownership of the stock, did wrong him to the *full extent* of its value.

III. The Circuit Court of Appeals, while not mentioning the State Court by name, in effect, severely criticized the State Court for entering the decree selling the stock to satisfy the lien, or, in any event, for actually permitting a sale to take place, declaring that *any sale* of the stock would bring about a "grossly inequitable result" and then added (R. 58):

> "The situation could have been easily clarified, *and it was Mackenzie's duty to procure that clarification before going to sale,* if he expected to seek the aid of a court of equity in enforcing his rights as purchaser.
>
> "An appropriate proceeding could have been taken in the equity court where the case was pending, and probably as ancillary or supplemental to that case, whereby it would have been adjudicated, as between Mackenzie, the corporation, Eschmann and the purchasers *pendente lite,* just what title would pass by the expected sale. After such an adjudication the sale would have been fair to all concerned and all suitable equitable enforcement remedies could have been asked without embarrassment."

COMMENT: Probably nothing in the Opinion of the Circuit Court of Appeals more clearly indicates (1) not only its *error,* but (2) its *unjustifiable criticism* of Mackenzie and the State Court than this quotation.

The fact is that when Mackenzie originally filed his suit in the State Court upon the note, seeking to enforce his lien on the stock, he made the corporation, Engelhard Co., a party defendant (R. 20) (the precise thing which the Circuit Court of Appeals criticized him for *not* doing); and the Engelhard Co. procured its dismissal from the suit upon the ground that it was not a necessary or proper party thereto (R. 21). The State Court expressly decided that "Engelhard & Sons Co. are not a party to the transaction and are *unnecessary* parties to the action. That corporation *cannot be proceeded against* until plaintiff [Mackenzie] becomes the owner of the certificate and a new certificate in his name is demanded by him and refused by Engelhard & Sons Co." (R. 21).

As the State Court, having personal jurisdiction over Mackenzie, Eschmann and the Engelhard Co., decided, at the instance of the Engelhard Co., that it was *not* a proper party to the action and could not be sued until after Mackenzie had purchased the stock at the foreclosure sale and had been refused a new certificate, certainly the Federal Court has now no right to say that such decision was wrong and to defeat Mac-

kenzie's claim, upon the ground that he ought to have brought the Engelhard Co. in as a defendant to the State Court suit—the very thing he tried to do and which the State Court held could not be done.

The State Court held that the Engelhard Co. was not a proper defendant to the suit and it was utterly impossible for Mackenzie to have carried out the Circuit Court of Appeals' suggestion that he should have made it a party.

It is difficult to exaggerate the injustice that is done Mackenzie by the Circuit Court of Appeals, in basing its defeat of his rights, upon the ground that he did not do something which he ought to have done, when, in point of fact, he did that very thing, but the State Court held that he had no right to do it—and it is the State Court and *not* the Circuit Court of Appeals which was entitled to decide whether the Engelhard Co. was or was not a proper defendant in the State Court suit.

It might be added, parenthetically, that Eschmann's wife and attorney, to whom he had the stock transferred before the judgment was reversed and pending the appeal, were not purchasers for value, but were *pendente lite* purchasers; that any rights acquired by them under the lower State Court decree were subject to be divested by a reversal; and that when the decree was reversed all such rights were vacated, no State being so rigid as Kentucky is in the en-

forcement of that rule. (*Clarey* v. *Marshall*, 4 Dana, 95, 98.)*

IV The Circuit Court of Appeals went upon the theory (which we will endeavor to demonstrate is totally erroneous) that, sitting in equity, it had the right to revise the judgments of a State Court (which was equally sitting in equity) by holding that when a plaintiff applies for equitable relief to a Federal Court, that Court can exercise its own judgment as to the relief it will grant, if it thinks that a State Court, in equity, did not decide an equity suit as the Federal Court thinks it should have been decided.

In other words, the Circuit Court of Appeals interprets the maxim, "He who seeks equity must do equity" to mean that a Federal Court in administering equitable remedies can convert them into a pure money judgment and then reduce the sum allowed in such an amount as, in the opinion of the Court, will compensate for the amount of wrong or error committed by another equity Court (State Court) in deciding a case properly before it. That this is not an exaggerated statement of the Circuit Court of Appeals' position may be seen from the following quotation in its Opinion (R. 57, 59):

**Kirkland* v. *Trott*, 75 Ala. 321; *Real Estate Sav. Co.* v. *Collonious*, 63 Mo. 290; *Carr* v. *Cates*, 96 Mo. 271, 274; *Dunnington* v. *Elston*, 101 Ind. 373, 375; *Debell* v. *Foxworthy*, 9 B. Mon. 228; *Clark* v. *Farrow*, 10 B. Mon. 446; *Martin* v. *Kennedy*, 83 Ky. 335; *Cook* v. *French*, 96 Mich. 525; *Lord* v. *Hawkins*, 39 Minn. 73, 76; *Smith* v. *Burns*, 72 Miss. 966; *Harle* v. *Langdon*, 60 Tex. 555.

"It is fundamental that a plaintiff who does not rely upon his strict legal rights but asks special relief from a court of equity, subjects himself to the equitable discretion of that Court, and may be denied some measure of his legal rights if to grant them all would be distinctly inequitable. * * * The rule which shapes the relief given by a court of equity in circumstances where equitable considerations make that relief contingent upon plaintiff's acceptance of less than full legal rights, must vary in its application with every case. We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules.

"We therefore conclude that as against the corporation, which in some measure represents its stockholders of record, and for the purpose of the decree which the court below, sitting in equity, ought to have rendered, it must be considered that at the time of plaintiff's demand upon the corporation for a transfer of stock, *he had only a lien for his debt and interest,* so that his measure of damages against the corporation in this equitable proceeding should be *limited* to the amount necessary to discharge such lien. The lien would, we think, include the costs of the state court proceedings up to the time of the decree of the trial court directing a sale, but not thereafter."

COMMENT: The Circuit Court of Appeals, ignoring the fact that Mackenzie's lien on the stock had, by the State Court sale, disappeared as a lien and had been converted into a legal title to the stock itself, argued that "at the time of plaintiff's demand upon the corporation for a transfer of stock," which was many months *after*

the sale and the confirmation thereof, he "had only a *lien* for his debt and interest." Is not that a case of a Federal Court absolutely disregarding a State Court judgment and attempting to say that, long after the State Court had wiped out the lien and converted it into a title, that, nevertheless it still remained "only a lien"?

CONCLUSION.

The monetary loss to Mackenzie as the result of the decision of the Circuit Court of Appeals, while very considerable to him, is, after all, of course, no reason for the granting of a Certiorari.

But it would seem as if this case was one in which it was eminently proper, indeed, if not required, that a Certiorari should issue, in order that some authoritative rule be laid down for the guidance of State and Federal Courts alike, as to how far either, when sitting in equity, may assume a more or less arbitrary power to compel a litigant to give up that which he had fairly acquired in a Conrt of another jurisdiction, as a condition of obtaining relief, according to well established equitable principles, in the other forum.

Even at the risk of repetition, it must be insisted that a Federal Court, in equity, is not entitled to decide a case according to the individual ideas of what the result should be, but that it is bound by the fixed principles of equitable juris-

prudence, one of which is that it must give to the judgment of a State Court, having personal jurisdiction of the parties, the same effect as to the rights arising therefrom, as would be accorded by the judgment in the State where rendered; and, furthermore, that even if the Engelhard Co. desires to avail itself of the maxim that if Mackenzie seeks equity he must do equity, still the Engelhard Co. *must not have conducted itself in such a manner, or have placed conditions and circumstances around Mackenzie, that would make it inequitable for the Engelhard Co. to avail itself of the maxim.*

But for the wrongful act of the Engelhard Co. no damage would have occurred to Mackenzie, and hence no cause of action would have arisen; and to permit the Engelhard Co. to set up this defense would be to give it an unjust advantage by reason of its own wrong. (1 Story's Equity Jurisprudence, 14th Edition, Section 74.)

The Engelhard Co., whose president was Eschmann's brother-in-law, committed the first wrong by disregarding its full knowledge of Mackenzie's pending claim, and, combining with Eschmann to defraud Mackenzie, transferred the stock to Eschmann's wife (Engelhard's sister) and attorney (also Engelhard's attorney), from which latter Engelhard himself purchased back the stock so transferred (R. 22, 23).

When the Engelhard Co. injected itself, as a volunteer, into the controversy between Mac-

kenzie and Eschmann, and loaned its aid to assist Eschmann to defeat Mackenzie's lien, it did so at its peril; and when the Kentucky Court of Appeals reversed the judgment, all intermediate transfers to purchasers *mala fides* were vacated.

The Circuit Court of Appeals should not be permitted to substitute its views for those of the State Court as to the nature of the proceedings which should have been taken in the State Court or as to the propriety of the judgment therein rendered.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

April 15, 1923.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

Nos. 55, 59.

LOUIS B. MACKENZIE, - - - - - - *Petitioner,*

vs.

A. ENGELHARD & SONS CO., - - - *Respondent.*

A. ENGELHARD & SONS CO., - - - - *Petitioner,*

vs.

LOUIS B. MACKENZIE, - - - - - - *Respondent.*

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR LOUIS B. MACKENZIE.

A Federal Court has no right to disregard a final judgment of a State Court because the Federal Court thinks it produced a "grossly inequitable result" and to substitute therefor the Federal Court's conception of what the State Court should have done.

SAMUEL B. KING,
WM. MARSHALL BULLITT,
Counsel for Louis B. Mackenzie.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

PAGES

STATEMENT OF THE CASE:

1. The facts of the controversy..... 1
2. The District Court's decision..... 8
3. The Circuit Court of Appeals' decision..... 11
4. Assignment of Errors..... 14
5. Summary of Points Discussed..... 14

ARGUMENT:

I. Mackenzie became the full legal owner of the 130 shares of stock, as purchaser at a valid judicial sale, duly confirmed by the State Court.

The prior transfer of the stock to Eschmann's wife and attorney did not defeat Mackenzie's title at the judicial sale.

Any rights acquired by Eschmann or by his wife or attorney through him, under the lower State Court original decree, were subject to be divested by a reversal; and when the decree was reversed, all such rights were vacated. 15-37

(1) Mackenzie acquired a valid title to the stock 16

Sprague v. *Cocheco Mfg. Co.*, Fed. Cas. 13249.
Pacific Nat. Bank v. *Eaton*, 141 U. S. 227.
Commonwealth v. *Peebles*, 134 Ky. 121.
First Nat. Bank v. *Bowman*, 168 Ky. 433.

PAGES

(2) The prior secret transfer did not affect Mackenzie's title. 22

Eberhardt v. *Wahl*, 124 Ky. 223.
Hammond v. *Hastings*, 134 U. S. 401.
Ky Stats., §2121.

(3) Any rights acquired under the original decree were vacated on the reversal thereof. . 27

Clarey v. *Marshall*, 4 Dana, 95.
Golden v. *Riverside Coal & Timber Co.*, 184 Ky. 200.
Webb v. *Webb's Gdn.*, 178 Ky. 152.

(4) Analysis of the Engelhard & Co.'s authorities. 32

II. The Engelhard Co. was liable to Mackenzie for refusing to transfer to him the 130 shares of stock. 38-48

St. Romes v. *Cotton Press Co.*, 127 U. S. 614.

(1) A corporation acts at its peril in deciding between rival claimants to a certificate of stock. 40

1 Mechan's Modern Law of Corp., §935.
Miller v. *Doran*, 245 Ill. 200.

(2) The true owner can recover damages from the Corporation. 45

Telegraph Co. v. *Davenport*, 97 U. S. 369.
Moores v. *Citizens Nat. Bk.*, 111 U. S. 156.

III. Mackenzie is entitled to recover from the Engelhard Co. either—

(1) the 130 shares of stock and all dividends declared since October 30, 1918, or

PAGES

(2) the agreed value of the stock as of October 30, 1918, plus the dividends subsequently declared thereon. 49-51

St. Romes v. *Cotton Press Co.*, 127 U. S. 614.

IV. The Circuit Court of Appeals erred in limiting Mackenzie's recovery to his original $7,500 debt and interest. 51-55

SUMMARY OF ITS OPINION. 51

It ignored the State Court judgment.

Cooper v. *Newell*, 173 U. S. 555, 567.
Yazoo & M. V. R. Co. v. *Clarksdale*, 257 U. S. 10.

ANALYSIS OF THE OPINION OF THE CIRCUIT COURT OF APPEALS. 55

(1) Mackenzie not subject to criticism for refusing to supersede. 55

(2) Mackenzie was damaged to the *full value* of the stock. 57

(3) The Circuit Court of Appeals' unjustifiable criticism of the State Court's action. 57

(4) The Circuit Court of Appeals' unjustifiable criticism of Mackenzie. 60

(5) No principle of equity authorizes a Federal Court to revise a State Court judgment. . . . 64

Cooper v. *Newell*, 173 U. S. 555, 567.
Magniac v. *Thomson*, 15 How. 281.
Betzler v. *James*, 227 Mo. 375.
Heyward v. *Bradley*, 179 Fed. 325.

CONCLUSION. 70

AUTHORITIES.

PAGES

Bank of Am. v. *MacNeil*, 10 Bush, 54 51
Bank of Ky. v. *Winn*, 110 Ky. 140 38
Bank of U. S. v. *Bank of Wash.*, 6 Pet. 19 32
Betzler v. *James*, 227 Mo. 375 67
Black v. *Zacharie*, 3 How. 483 45
Carr v. *Cates*, 96 Mo. 271 28
Church v. *Cit. Street Ry.*, 78 Fed. 526 25
Citizens Nat. Bank v. *States*, 45 L. R. A. (N. S.) 1075 38
Citizens S. & P. Co. v. *I. C. R. R.*, 205 U. S. 46 23
Clarey v. *Marshall*, 4 Dana, 95 28
Clark v. *Farrow*, 10 B. Mon 228 28
Commonwealth v. *Peebles*, 134 Ky. 121 20
Cook v. *French*, 96 Mich. 525 28
Cooper v. *Newell*, 173 U. S. 555 ..... 53, 66
Cushman v. *Thayer Mfg. Co.*, 76 N. Y. 365 38
Debell v. *Foxworthy*, 9 B. Mon. 228 28
Donifau v. *Bill*, 1 B. Mon. 199 37
Dunnington v. *Elston*, 101 Ind. 373 28
Eberhardt v. *Wahl*, 124 Ky. 223 23
Fidelity Trust Co. v. *Lou. Bank Co.*, 119 Ky. 675 ..... 32, 33
First Nat. Bk. v. *Bowman*, 168 Ky. 433 21
Golden v. *Riverside Coal & Timber Co.*, 184 Ky. 200 ..... 31, 34
Hammond v. *Hastings*, 134 U. S. 401 ..... 24, 25
Harle v. *Langdon*, 60 Tex. 555 28
Heyward v. *Bradley*, 179 Fed. 325 68
Horton v. *Sherrill, etc., Co.*, 147 Ky. 226 23
Insurance Co. v. *Clark*, 203 U. S. 75 ..... 32, 34
Jones v. *Lou. Tob. Whse. Co.*, 135 Ky. 824 23
Kelly v. *Norwich*, 82 Iowa, 137 37
Kirkland v. *Trott*, 75 Ala. 321 28

PAGES

Langley v. *Warner*, 3 N. Y. 327..... 32
Leurey v. *Bank*, Ann. Cas. 1913 E, p. 1174..... 38
Lord v. *Hawkins*, 39 Minn. 73..... 28
Mackenzie v. *Engelhard Co.*, 286 Fed. 813..... 2
Mackenzie v. *Eschmann's Ex'trs.*, 174 Ky. 450..... 5
Magniac v. *Thomson*, 15 How. 281..... 67
Martin v. *Kennedy*, 83 Ky. 335..... 28
Miller v. *Doran*, 245 Ill. 200..... 41
Moores v. *Citizens Nat. Bank*, 111 U. S. 156..... 47
Mundt v. *Commercial Nat. Bank*, 136 Am. St. Rep. 1023..38, 44
O'Neil v. *Wolcott Mining Co.*, 27 L. R. A. (N. S.) 200..... 44
Pacific Nat. Bk. v. *Eaton*, 141 U. S. 227..... 20
Phelps v. *Elliott*, 35 Fed. 455..... 34
Ramage v. *Gould*, 176 Calif. 746..... 38
Real Estate Co. v. *Collonious*, 63 Mo. 290..... 28
St. Romes v. *Cotton Press Co.*, 127 U. S. 614.....7, 38, 39, 49, 50
Shaw v. *Goebel Brew.*, 202 Fed. 408..... 23
Skinner v. *Ft. Wayne R. Co.*, 58 Fed. 55..... 39
Smith v. *Burns*, 72 Miss. 966..... 28
Sprague v. *Cocheco Mfg. Co.*, Fed. Cas. 13249..... 17
Taylor v. *Cook*, 136 Ala. 354..... 37
Telegraph Co. v. *Davenport*, 97 U. S. 369..... 7, 45
Webb v. *Webb*, 178 Ky. 152.....31, 33
Yazoo & M. V. R. Co. v. *City of Clarksdale*, 257 U. S..... 54
2 Cook on Corp., 7th Ed., Secs. 411-415, 437..... 25
14 Corpus Juris, 757, Sec. 1158..... 38
Fletcher Cyc. of Corp., §3779..... 25
Ky. Stat., Sec. 2128..... 23
1 Machen's Mod. Law of Corp., Secs. 842, 935, 937.....25, 40
4 Pomeroy's Eq. Jur., 3rd Ed., Sec. 1412, note..... 38
2 R. C. L. 273 35
7 R. C. L., p. 268..... 44

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924. Nos. 55, 59.

LOUIS B. MACKENZIE, - - - - - *Petitioner,*

vs.

A. ENGELHARD & SONS CO., - - *Respondent.*

A. ENGELHARD & SONS CO., - - *Petitioner,*

vs.

LOUIS B. MACKENZIE, - - - *Respondent.*

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR LOUIS B. MACKENZIE.

These writs of *certiorari* involve the liability of the Engelhard Co. for 130 shares of its capital stock, which it transferred on its books to a *pledgor's* wife and attorney with full knowledge that Mackenzie, as *pledgee,* claimed to be (as was subsequently *established by a judicial decree*) entitled thereto.

* * * * *

A State Court, having personal jurisdiction of the parties, foreclosed Mackenzie's lien, had a judicial sale of the stock, confirmed the sale to Mackenzie as purchaser thereat, and executed a Bill of Sale therefor.

Mackenzie then sued the corporation for the stock. The DISTRICT COURT (EVANS, J.) held the Engelhard Co. liable for only $13,254.75 (the amount of the original $7,500 debt, with interest and one dividend added) instead of $23,160.15 (the stipulated value of the stock plus two dividends thereon) (R. 36). Both parties appealed (R. 36-38).

The CIRCUIT COURT OF APPEALS *reversed* the District Court, held that the State Court's decree produced "a grossly inequitable result," and *reduced* Mackenzie's recovery to his original $7,500 debt and interest, to wit, $11,892.50, thereby depriving Mackenzie of any benefit of his purchase at the judicial sale (R. 44, *Mackenzie* v. *Engelhard & Sons Co.*, 286 Fed. 813, 817). Both parties obtained writs of *certiorari* (262 U. S. 739).

The facts are all stipulated (R. 14-20, 34).

There are just two questions of law presented: *First,* did Mackenzie acquire title to the stock at the judicial sale? and, *Second,* if so, can a Federal Court refuse to enforce his title, because it disagrees with the State Court's action in selling the stock to him?

STATEMENT OF THE CASE.

1. Mackenzie's original demand that the certificate of stock be transferred to himself as pledgee. In 1912, Mackenzie owned a $7,500 collateral note, executed by one Eschmann, which note recited on its face that there was deposited therewith as collateral security "Certificate of Stock No. 24 for 130 shares of the capital stock of A. Engelhard & Sons Co.," but the stock certificate (which stood in Eschmann's name) had not been actually endorsed in blank (R. 15).

On December 10, 1912, Mackenzie presented the note and stock certificate to the Engelhard Co. (through its President, V. H. Engelhard) and demanded that the stock be transferred to his name *as pledgee,* but the company refused to do so because the certificate itself was not endorsed in blank (R. 15, 17).

2. The State Court suit to enforce Mackenzie's lien on the stock. Shortly thereafter (March 10, 1913) Mackenzie filed suit in the State Court at Louisville, Ky., against Eschmann and the Engelhard Co., to recover on the note and to enforce his lien on the stock (R. 15).

At the instance of the Engelhard Co., the lower court dismissed the suit against it as an unnecessary party to the litigation, holding that the Engelhard Co.

> "cannot be proceeded against until plaintiff becomes the owner of the certificate and a new cer-

> tificate in his name is demanded by him and refused by Engelhard Co." (R. 15, 16);

and, on final hearing, decided that Mackenzie was not a *bona fide* holder, dismissed his petition, and adjudged that the maker of the note, Eschmann, might withdraw the stock certificate from the Court files where it had been filed as an "Exhibit" with Mackenzie's petition (R. 22, 30, 31).

Mackenzie immediately appealed to the Kentucky Court of Appeals (R. 7, 23); but he did not supersede the judgment which permitted Eschmann to withdraw the stock certificate from the Court files (R. 17).

3. How Eschmann obtained physical possession of the pledged stock certificate. Some months later and during the pendency of the appeal, Eschmann (acting under the permission given in the decree) withdrew from the Court files the stock certificate, No. 24 for 130 shares, executed a power of attorney to transfer it, presented the stock certificate and power of attorney to the Engelhard Co. (of which his *brother-in-law* was President), and, at his request, the Engelhard Co. marked the old certificate "cancelled," split it up into two new certificates, issued and delivered them as follows (R. 17):

	Shares
(*a*) To R. A. McDowell, attorney at law for Eschmann, for Engelhard Co. and for Mrs. Eschmann 25 shares; and McDowell then sold and transferred the 25 shares to Eschmann's brother-in-law, V. H. Engelhard, President of the Engelhard Co., who knew all the relationships of the parties to the transaction and of Mackenzie's claim to the stock.	25
(*b*) To his wife, Mrs. Eschmann, who still holds the certificates therefor	105
Total shares	130

No record of the transfer from husband to wife was made as required by Ky. Stat., §2128.

This entire transfer was secret and was not known to Mackenzie until *over six years thereafter.*

4. Kentucky Court of Appeals reversed the lower court and upheld Mackenzie's claim to the stock. The Kentucky Court of Appeals *reversed* the judgment below, and decided that Mackenzie was entitled to recover the full amount of the note with interest, and to enforce his lien on the stock (R. 18, 24-28; *Mackenzie* v. *Eschmann's Ex'trs.*, 174 Ky. 450).*

5. Final decree of the State Court awarded the 130 shares stock to Mackenzie. In accordance with the mandate of the Kentucky Court of Appeals, the lower court vacated its prior decree and

*Eschmann died during the appeal and the action was duly revived against his wife, *et al.*, as Executors (R. 18).

entered a new one, wherein it adjudged (R. 18, 28, 29):

1. That Mackenzie recover $7,500 with interest and costs from Eschmann's Executors—one of whom was his wife, Mrs. Eschmann, who held and still holds 105 shares of the stock.
2. That, to secure the payment of the judgment, Mackenzie had a lien on the 130 shares of Engelhard Co. stock, and on any certificates which had been or might thereafter be, issued by Engelhard Co. to the Executors in lieu of the original certificate; and that the Executors return to the Court the certificate No. 24, withdrawn from its files.
3. That "said shares of stock" be sold free of all liens to satisfy Mackenzie's claim.

As the Executors were non-residents of Kentucky, the Court could not enforce its decree requiring a return of the certificate (R. 18).

Pursuant to that final decree, the judicial sale was duly advertised, held, confirmed, and a bill of sale acknowledged, executed and delivered by the Court to Mackenzie conveying to him the 130 shares of stock in the Engelhard Co., which, on July 15, 1918, he had purchased at such judicial sale thereof (R. 8, 19, 29-31).*

The final decree, order of confirmation, etc., were never appealed from and are the final and conclusive judgments of the State Court.

*The sale was had on July 15, 1918, during vacation, and consequently was not confirmed until October 30, 1918; and the Bill of Sale was actually delivered to Mackenzie on December 7, 1918 (R. 19, 31).

Mackenzie thus acquired lawful title to the 130 shares.

The Engelhard Co. paid cash dividends on the stock to Mrs. Eschmann and Mr. Engelhard, as follows (R. 35):

Nov. 30, 1918, 25%	$3,250.00
Nov. 30, 1919, 18%	2,340.00
Dividends	$5,590.00

6. Mackenzie's unsuccessful efforts to obtain the stock from the Engelhard Co. On April 29, 1919, Mackenzie presented to the Engelhard Co. a certified copy of the Bill of Sale, and demanded a certificate for 130 shares, which was refused. Mackenzie was still kept in ignorance of the fact that the stock had been transferred to Mrs. Eschmann and Mr. Engelhard.

7. Institution by Mackenzie of the present suit in the Federal Court to compel the Engelhard Co. to issue, or pay the value of, the 130 shares. On July 3, 1919, Mackenzie (following the precise course approved in *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, and *Telegraph Co.* v. *Davenport*, 97 U. S. 369), filed the present suit in the Federal Court at Louisville, against the Engelhard Co., alleging substantially the facts herein above set out (which were all later stipulated to be correct, R. 14-20), and seeking (R. 4):

1. Delivery of a certificate for 130 shares; or,
2. If a new certificate could not be lawfully issued, a judgment for the value of the

stock (stipulated to be $16,900 (R. 34) and for the dividends declared since the sale on July 15, 1918 (stipulated to be $5,590, R. 35).

The defense set up by the Amended Answer (R. 11-14) was (1) that as Eschmann had gotten possession of the original certificate under the first decree below and presented it to Engelhard & Co., who had issued new certificates therefor (still concealing the names of such transferees), it could not lawfully issue new certificates to Mackenzie for the same stock; and (2) that the subsequent decree in the State Court was void because the Court did not have physical possession of the certificate and, hence, could not decree a sale thereof.

8. Decision of the District Court. The District Court held that Eschmann had speedily "split up" the 130 share certificate, in favor of his wife and his attorney, in order to defeat any relief to Mackenzie if the State Court judgment should be reversed; that the Engelhard Co. knew all about the controversy over the stock and Mackenzie's claim thereto, and that any transfer of the stock which it made, with that knowledge, was at its peril; that it should have refused to transfer it pending the appeal or demanded a bond of indemnity; and that it was liable to Mackenzie (R. 31-34).

The District Judge who, as an old Kentucky practitioner, was thoroughly familiar with the

law of Kentucky regarding appeals and *supersedeas*, said (R. 32, 33):

> "All of the persons who got portions of the 130 shares of the defendants' capital stock when Certificate #24 was 'split up,' may have confidently thought that the early action of the State Court sustaining the demurrer of A. Engelhard & Sons Company to the petition therein pending would prevent any further trouble as to those shares, and they may all have been confident that that action of the State Court would be approved upon appeal, but that confidence or assumption or belief would not, as matter of law, relieve them of any obligation in respect to that 130 shares which might be made clear by any reversal of the judgment of the Jefferson Circuit Court.
>
> "*Prima facie* it made no difference to the defendant corporation what individuals became the holders of its capital stock, and that particular question was not of itself of any special moment to it, but it was a matter of prime importance to the defendant as to whether it should wrongfully and with such knowledge of the facts, issue certificates for that 130 shares of stock to others than those who might ultimately be held by the State Courts to be entitled to it.
>
> "Especially cannot the defendant very persuasively urge the argument necessary to support its contention when this stock was used first to pay to the attorney a $2,500 fee in that litigation and when the other 105 of the 130 shares were delivered to other persons who were of kin to the president of the company. Those things, *per se*, might not have been in any way wrong, but they seem to have presented a temptation to speedy action in order to set up a barrier to plaintiff's claims. * * *
>
> "The fact that the judgment was not superseded did not in any way alter the obligation of the defendant to see to it that the 130 shares of

stock evidenced by Certificate #24 should be kept in condition to meet any duty or obligation devolving on the corporation when final judgment should ultimately be rendered by the State Courts, and as the mere distributor of certificates of the stock to those entitled, defendant should have kept the situation intact, so as to meet the requirements of any judgment in the litigation in the State Court. And for its own safety it might have demanded indemnity before it acted.

"*Prima facie*, as we have said, it was a matter of indifference to the defendant corporation as to who should hold the title to its stock, but if, having notice of the facts, it participated (as was done here) in the giving of certificates of that stock to persons other than those who were entitled thereto, it could not thereby deprive plaintiff of his rights to the stock in the corporation.

"In short, under the circumstances, the defendant having full notice of the facts, it was its duty not to transfer that stock to anybody except under the judgment of the court. Until that judgment was finally rendered it was its duty, as well as its right, to preserve the status so that it might be able to meet the requirements of whatever judgment might be rendered. Its failure to do that subjects it to a liability to the plaintiff, and the fact that the fee of Mr. McDowell was due from whoever employed him did not support a conclusion that that fee could be paid out of stock ultimately to be adjudged to be owned by some other stockholder than the debtors of the attorney."

The District Court then very illogically held that Mackenzie should recover from Engelhard, not the value of the stock which Mackenzie had bought at the judicial sale, but (1) the amount of Mackenzie's original debt of $7,500 with interest from July 25, 1911, to December 7, 1918 (the date

of the judicial bill of sale to Mackenzie), *plus* (2) the 18% dividend subsequently declared, November 30, 1919, with interest to the date of the decree —a total of $13,354.75 (R. 36).

Mackenzie appealed from the failure to give him the *full value* of the collateral he bought in (R. 36-37).

Engelhard & Co. appealed from the decree holding it liable for *anything* (*Id.*).

9. The Circuit Court of Appeals' decision. The CIRCUIT COURT OF APPEALS not only denied to Mackenzie (as did the District Court) any relief as *owner* of the stock acquired at the judicial sale, but it went further and denied him the right to the 18% dividend paid November 30, 1919 (which the District Court had allowed him); it reversed the decree and limited Mackenzie's recovery to his *original debt* and interest—thereby absolutely ignoring the State Court judicial sale as completely as if it had never occurred (R. 44).

The CIRCUIT COURT OF APPEALS (without the citation of a single authority on any proposition) held:

(1) That the foreclosure sale was completely valid as against Eschmann (pledgor) and his wife and attorney (*pendente lite* purchasers): and that Mackenzie acquired the legal title to the stock, so that "in an action *at law* against the corporation for its refusal to re-issue the stock to him, he [Mackenzie] would be entitled to recover *full damages*" (R. 42).

(2) But that as Mackenzie sued *in equity* to recover the stock or its value, the Federal

Court has the *"equitable discretion"* to make any relief granted (even though such relief be not the specific delivery of the stock, but a *pure money judgment* in damages) "contingent upon plaintiff's acceptance of *less* than full legal rights" (R. 42, 44).

(3) That Mackenzie ought to have superseded the lower State Court judgment (R. 42); but not having done so, he was under an "equitable obligation to clear up the title before proceeding to sale"; and after the State Court entered a decree of foreclosure, he ought to have refrained from having the sale proceed, and should have made the Engelhard Co. and the wife and attorney parties to the suit by supplemental proceedings, in order to determine what title would pass by the sale (R. 43)—notwithstanding the fact (*a*) that he had originally made the Engelhard Co. a party defendant to the foreclosure suit, and it had secured its dismissal as an unnecessary party (R. 15, 16); (*b*) that he did *not even know* of the transfers for nearly three years after the sale; (*c*) that the wife and attorney were both purchasers *with* notice, and the wife at least *without* value (R. 17, 19, 41); and (*d*) that the Court of Appeals apparently concedes the foreclosure sale was valid and passed a good title to Mackenzie (R. 42).

(4) That the Court of Appeals felt it was *"grossly inequitable"* for the State Court to have confirmed a sale of $17,000 of stock for $100—notwithstanding the fact that all parties were present at the sale and that the small price bid was due to the announcement by the authorized attorney of the Eschmann and Engelhard interests, that the sale would carry no title to the thing sold, and to which sale no exceptions were filed nor appeal taken (R. 43, 49).

(5) That in order to correct what it deemed to be the State Court's "grossly inequitable result," the Federal Court sitting *in equity* (as distinguished from law) would exercise its "equitable discretion" to deny Mackenzie his full legal rights and to give him such *lesser* rights as would, in its opinion, *when computed on a money basis*, serve to correct the alleged inequitable action of the State Court.

Is it possible that a Federal Court has the power to disregard legal rights acquired under State Court suits—not because the State Court procedure was void—but because it does not accord with the Federal Court's idea of how the suit should have been decided on the merits?

The Court of Appeals erred in its conception of the function of the general equitable principle that the relief granted may be less than the legal rights. That principle can not be utilized to enable a Federal Court to disregard rights and titles acquired under valid State Court decrees, in order to conform such rights and titles to what the Federal Court thinks the State Court should have done.

Suppose a Federal Court had sold a railroad under foreclosure. Would a State Court be heard to say that it would disregard the purchaser's title so acquired, and merely grant him a lien for his purchase price, while restoring the property to the original owner, because the State Court felt the Federal decree produced a "grossly inequitable result"? Certainly not.

ASSIGNMENTS OF ERROR.

The respective assignments of error raise the question of the extent, if any, of the Engelhard Co.'s liability to Mackenzie (R. 36-37).

SUMMARY OF POINTS DISCUSSED.

1. **Mackenzie became the full legal owner of the 130 shares of stock, as purchaser at a valid judicial sale, duly confirmed by the State Court.**

   The prior transfer of the stock to Eschmann's wife and attorney did not defeat Mackenzie's title at the judicial sale.

   Any rights acquired by Eschmann or by his wife or attorney through him, under the lower State Court original decree were subject to be divested by a reversal; and when the decree was reversed, all such rights were vacated.

2. **The Engelhard Company was liable to Mackenzie for refusing to transfer to him the 130 shares of stock.**

3. **Mackenzie is entitled to recover from the Engelhard Company, either:**

   (1) The 130 shares of stock and all dividends declared since October 30, 1918; or

   (2) The agreed value of the stock as of October 30, 1918, plus the dividends subsequently declared thereon.

4. **The Circuit Court of Appeals erred in limiting Mackenzie's recovery to his original $7500 debt and interest.**

FIRST POINT.

Mackenzie became the full legal owner of the 130 shares of stock, as purchaser at a valid judicial sale, duly confirmed by the state court.

The prior transfer of the stock to Eschmann's wife and attorney did not defeat Mackenzie's title at the judicial sale.

Any rights acquired by Eschmann, or by his wife or attorney through him, under the lower State Court original decree were subject to be divested by a reversal; and when the decree was reversed, all such rights were vacated.

Both the District Court (R. 7, 33, 35) and the Circuit Court of Appeals (R. 42) correctly assumed that the State Court judicial sale was valid and that Mackenzie acquired title to the stock, the Court of Appeals saying (R. 42):

> "We have no doubt that, in spite of the withdrawal of the certificate from the court files, the State Court retained jurisdiction over the subject matter sufficiently to decree a foreclosure sale valid as between the parties, and for the purpose of this opinion, and without undertaking to decide the questions involved, we assume that the foreclosure of the lien upon the stock was so completely valid that, as against both Eschmann and purchasers *pendente lite*, Mackenzie acquired the legal title to the stock."

We submit:

1. *Mackenzie became the full legal owner of the 130 shares of stock, as purchaser at a valid judicial sale, duly confirmed by the State Court.*

The validity of Mackenzie's title to 130 shares of stock is *res judicata.* The State Court had both parties, pledgor and pledgee, personally before it, had physical custody of the stock certificate, and ultimately decided that Mackenzie had a valid lien on the stock; it gave a personal judgment, ordered a judicial sale of the stock to satisfy such judgment, and the sale was duly held, at which all parties were present or represented; Mackenzie became the purchaser, the sale was confirmed, and a regular Bill of Sale by the Court's Commissioner was ordered, executed and approved, and delivered to Mackenzie, thereby transferring to him all of the title of Eschmann, his estate, and the other parties to the suit (R. 18, 19, 28-31).

The Validity of the State Court Judicial Sale.

1. In response to the Engelhard Co.'s contention (R. 14) that the State Court's final decree on October 31, 1917 (R. 28), was absolutely void because at the time of its rendition the Court did not have the actual physical custody of the stock certificate, we need only respond:

(*a*) Having both parties personally before it, the State Court had jurisdiction to give a valid

judgment on the note in favor of Mackenzie and against Eschmann's executors.

(*b*) The Court could certainly adjudge that Mackenzie had a lien on the shares of stock which had been pledged to secure the payment of the note.

A certificate of stock is mere *evidence* of the ownership of stock. It is not the stock itself. Eschmann had pledged the shares of stock, evidenced by the certificate, to secure the debt. The Court could adjudge a lien on the shares of stock without having the physical custody of the certificate itself. The Court originally had possession of the physical certificate, but had erroneously surrendered it to Eschmann under the original judgment. When that judgment was reversed, and Eschmann's executors were decreed to return the certificate to the Court (R. 29), their failure so to do could not affect the power of the Court to adjudge a lien upon the stock to secure the payment of the note on which it was pledged.

In *Sprague* v. *Cocheco Mfg. Co.,* Fed. Cases 13249, the stock stood in the name of a Trustee. A State Court removed the Trustee, directed him to transfer the estate to a new Trustee, and the Court's Master in Chancery assigned the stock to the new Trustee, but without ever receiving the stock certificate from the old Trustee. The old Trustee negotiated the certificate to innocent holders for value, who brought suit in the Federal

Court against the corporation to compel their recognition as stockholders.

The Federal Court held that the State Court had full jurisdiction, by decree, to transfer the title of the stock to the new Trustee notwithstanding the certificate was outstanding; that the transfer to the new Trustee was valid, was a full protection to the corporation, and that the corporation could not be compelled to account to the holders of the certificate acquired from the old Trustee. The case is in point because it squarely decided that the State Court could transfer the title from the old Trustee to the new Trustee, notwithstanding the certificate was outstanding and never brought into the Court.

The Court aptly said:

> "It is sufficient, for the decision of the case, that I should say, that the decree of the Court in Massachusetts, and the assignment there made by the Master in Chancery is a full protection to the defendant against a claim made by the plaintiffs, under a transfer to them after such decree and assignment, unless they show, that before such decree, the person from whom they claim, and to whom they advanced their money, had acquired from the former Trustee a title which was good as against his successor. This they have not shown."

If the rights of any innocent *bona fide* purchasers for value had arisen, through successive intervening purchases of the 130 shares of stock pending the appeal, certificates for which had been successively turned into the corporation, can-

celled and new certificates issued, a serious question would arise as to the protection of such ultimate holders of the stock; in which event Mackenzie's remedy might be exclusively one for damages against the corporation. *But no such question arises,* as there has never been any subsequent transfer of the stock. It stands in the name of the original transferees and no rights of *bona fide* purchasers for value, without notice, have arisen.

Nor do any such considerations affect the validity of the State Court's judgment under which the stock was sold to Mackenzie. Mackenzie is protected in his purchase by all the principles governing judicial sales.

2. The Engelhard Co. contends that the State Court judgment, decreeing a lien on the stock and selling the stock, was void because: (1) the certificate had *never been endorsed,* and hence could not be pledged by delivery; (2) the lien was lost when Mackenzie, under order of Court, *surrendered possession* of the certificate to the Clerk of the Court; (3) the Commissioner of the Court when making the sale *did not have physical possession* of the thing sold; (4) at the time of the judicial sale a new certificate had been issued to Eschmann's wife and attorney; (5) that neither the judgment, Commissioner or bill of sale acted upon a sufficiently specific thing.

In response it is sufficient to observe that neither the judgment, order of sale, or order of

confirmation, was ever appealed from, and that the judgment *cannot be collaterally attacked here.*

Whether (*a*) a lien could be created by pledging a certificate of stock *without endorsing it in blank,* or (*b*) the *compulsory surrender of the possession* of the pledged thing under order of Court *destroys the lien,* or (*c*) a Court's Commissioner must have *physical possession* of the thing sold at the time of the sale, or (*d*) corporate stock could be sold and a bill of sale made therefor without having the mere evidence thereof in the shape of the stock certificate present—were all matters which, whether decided rightly or wrongly, could only affect the *correctness* of the judgment and *not its validity.* As Eschmann did not appeal, and the time for the appeal has long since expired, it must be assumed by this Court that the State Court's judgment represents a final adjudication as to the rights between Mackenzie and Eschmann and is not open to be collaterally attacked here.

3. The Engelhard Co. proceeds upon the theory that the 130 shares of capital stock *and* the particular certificate No. 24 which at one time evidenced those shares of stock *are one and the same thing.* Such is not the law. It is well settled that shares of stock exist *independently* of any certificate as evidence thereof. (*Pacific National Bank* v. *Eaton,* 141 U. S. 227, 233-4; *Commonwealth* v. *Peebles,* 134 Ky. 121, 126.)

Eschmann pledged to Mackenzie the 130 shares of stock not merely by the delivery of the stock

certificate, but by signing and delivering a promissory note which expressly recited that there was deposited therewith as collateral security the certificate for 130 shares (R. 15). This made, as between the parties, a perfectly valid pledge of the stock even though the certificate were not endorsed in blank. (*First National Bank* v. *Bowman,* 168 Ky. 433, 435.)

The Engelhard Co. always treats the *certificate* of stock No. 24 as if *it* were the thing which the State Court *ordered* sold, *actually* sold and then *conveyed.* It omits the important part of the decree, order of confirmation and bill of sale which respectively provide that Mackenzie had a lien "upon said 130 shares of stock *represented* by said certificate" and that there should be a sale of "the *said 130 shares* of capital stock" and that "*said shares* of stock shall be sold" and that there was conveyed to Mackenzie "the *said 130 shares* of the capital stock of the A. Engelhard & Sons Co. hereinabove described" (R. 28-31, 19).

It is thus seen that what the State Court undertook to do was *not* primarily to sell certificate No. 24, but was to sell 130 *shares* of stock which had been *evidenced* by certificate No. 24. The 130 shares of stock in controversy existed independently of the certificate. It was that particular 130 shares of stock which Eschmann pledged to Mackenzie, which Mackenzie held as pledgee, which the Court finally gave a lien upon, which was sold and which he purchased.

In the State Court, Eschmann, the then owner of the 130 shares of stock, *was a party and personally appeared.*

The Court certainly had jurisdiction to decide whether there was a valid pledge of the stock as between the parties. It did decide that point and it sold those particular 130 shares of stock. Notwithstanding the Engelhard Co.'s cancellation of certificate No. 24 pending the appeal, the particular 130 *shares* of stock remained in existence, was specifically identified, and was sold by the Court.

2. *The prior transfer of the stock to Eschmann's wife and attorney did not defeat Mackenzie's title at the judicial sale.*

During the pendency of Mackenzie's appeal in the Kentucky Court of Appeals, the Engelhard Co., with full knowledge of all the facts and of Mackenzie's claim, secretly transferred the 130 shares to Eschmann's wife and attorney—evidently because the President of the Company desired to assist his sister, his brother-in-law, and his own attorney, in defeating the possibility of Mackenzie ever collecting his debt in the event of a reversal (R. 17, 32, 33).

(*a*) *105 shares transferred to Mrs. Eschmann.* Mr. and Mrs. Eschmann were husband and wife, and so known to be to her brother, V. H. Engelhard, President of Engelhard Co. (R. 17).

Ky. Stat., §2128, provides:

> "A gift, transfer or assignment of personal property between husband and wife shall not be valid as to third persons, unless the same be in writing, and acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded."

Eschmann never acknowledged or recorded the transfer to his wife (R. 18).

In *Eberhardt* v. *Wahl,* 124 Ky. 223, 227, it was held that the transfer of corporate stock between a husband and wife was subject to the provisions of §2128, and was void unless recorded as chattel mortgages are required to be recorded. (See also *Jones* v. *Lou. Tob. Whse. Co.,* 135 Ky. 824.)

The Engelhard Co. suggests that the Eschmanns were residents of New York and hence not bound by the Kentucky statute. There is no evidence in the record that they were residents of New York at the time of the transfer. It is immaterial any way because the transfer of the capital stock of a Kentucky corporation must be determined by the law of Kentucky. (See *Citizens S. & P. Co.* v. *Ill. Cent. R. R.,* 205 U. S. 46, 57; *Shaw* v. *Goebel Brew. Co.,* 202 Fed. 408; *Horton* v. *Sherrill, etc., Co.,* 147 Ky. 226, 229.

The transfer to Mrs. Eschmann was absolutely void and the Engelhard Co. knew it was void.

Furthermore, she was, in no sense, a purchaser for value or without notice. She has never asserted any claim to the stock, so far as the record discloses. Therefore, the Engelhard Co. cannot avoid its present duty to transfer the stock to

Mackenzie, by saying that Mr. Eschmann had already transferred it to his wife—as such a transfer was void.

(*b*) *25 shares transferred to R. A. McDowell.* Mr. McDowell, as attorney for the Eschmanns and the Engelhard Co. in the State Court case (both lower and appellate courts), had *full knowledge* of Mackenzie's claim; and in taking the transfer of the 25 shares to himself, he did so subject to any reversal that might be had of the decree on which Eschmann's title to the stock depended (p. 27, *infra*).*

So, neither of the persons, to whom the Engelhard Co. permitted the stock to be transferred, were innocent purchasers for value; but (1) the transfer to the wife was both without value, and void under the statute, while (2) the transfers to McDowell and Engelhard were with full notice of Mackenzie's claim, pending on appeal (R. 41).

It is further argued that Eschmann might have endorsed the stock and delivered it to his wife and McDowell (without having it first transferred to them on the corporate books) and invested them with a perfect title. This is an error. Corporate stock is not negotiable (*Hammond* v. *Hastings,* 134 U. S. 401, 404). Any transferee, especially with notice or without value, who took the stock

*Likewise, V. H. Engelhard (to whom McDowell sold the 25 shares) had full knowledge of Mackenzie's claim, not only because he was the President and chief executive officer of the Engelhard Co., who was a defendant to Mackenzie's suit, but especially because Mackenzie had, before suing in the State Court, presented the note, and stock to Engelhard personally and demanded the transfer of the stock. [Cf. R. 15 (2, 3) R. 17 (9a, b).]

from Eschmann would have taken it subject to Mackenzie's rights thereto.

(*c*) *Stock certificates are not negotiable as to the first transferees.* Furthermore, stock certificates are not negotiable instruments (2 Cook on Corporations, 7th Ed. §§411-415, 437; 1 Machen's Modern Law of Corporations, §842), and even if Mrs. Eschmann and McDowell had, in good faith and without actual knowledge, bought the stock from Eschmann, they would have taken it subject to Mackenzie's claim; and when his lien was finally established by the Court of Appeals and the stock sold, their rights were subordinate to that lien. (*Church* v. *Citizens St. Ry.,* 78 Fed. 526, 530; Fletcher, Cyc. of Corporations, §3779.)

In *Hammond* v. *Hastings,* 134 U. S. 401, a Michigan corporation was, by the general laws of that State, given a lien upon the stock of its stockholders, for any indebtedness owing to it.

A person in Illinois bought stock in ignorance of the prior owner's indebtedness to the corporation. It was held that the corporation had a prior lien on the stock; and that the purchaser took the stock *subject* to such lien, although at the time of purchase ignorant that there was any lien or indebtedness against it.

The Court said (p. 404):

> "Repeated efforts have been made to have certificates of stock declared negotiable paper,

but they have been unsuccessful.* Such a certificate is not negotiable in either form or character; and, like every non-negotiable paper, whoever takes it does so subject to its equities and burdens; and though ignorant of such equities and burdens, his ignorance does not relieve the paper therefrom or enable him to hold it discharged therefrom."

If a corporation's lien could not be displaced by a transfer of the certificates to an innocent purchaser for value (who was wholly *ignorant* of the existence of the indebtedness creating the lien), *a fortiori* Mackenzie's lien could not be destroyed by a transfer of the certificates to Eschmann, pending the final decision of the Court as to the existence of the lien; nor to Mrs. Eschmann or McDowell, neither of whom were *bona fide* purchasers for value.

Even if this were a contest between Mackenzie on the one hand, and Mrs. Eschmann and McDowell on the other, Mackenzie's rights would be superior; and especially so as, in the one case, (1) there was *no consideration* and, (2) by statute, the transfer was *void,* while, in the other, (3) there was *full knowledge* and no consideration except the payment of a past debt (fee).

The fundamental error underlying the Engelhard Co.'s course in this entire matter, was its assumption that upon Eschmann's voluntary pres-

*In every case where a holder of stock certificates has been protected in his ownership as against the true owner, it has not been because the stock was negotiable, but because the true owner was in some way estopped to dispute the subsequent holder's title. There is no element here of estoppel against Mackenzie.

entation to it on February 20, 1915, of certificate No. 24 for 130 shares duly endorsed, it had the right to ignore its knowledge of Mackenzie's claim and his pending appeal, and transfer the stock as Eschmann desired.

Such is not the law governing a corporation's duty to its shareholders or those claiming to be shareholders.

3. *Any rights acquired by Eschmann, or by his wife or attorney through him, under the lower State Court original decree, were subject to be divested by a reversal; and when the decree was reversed, all such rights were vacated.*

1. The Engelhard Co.'s action in transferring the stock pending the appeal was its voluntary act, and was in no sense an act done under or pursuant to the judgment.

The original State Court judgment did not grant any right to, impose any duty upon, or require any action by the Engelhard Co., which was not even a party to the suit at that time (R. 23, 15). The judgment merely permitted Eschmann *to have possession* of the stock certificate. Consequently, any action taken by the Engelhard Company, which was not a party to the suit, was taken on its own responsibility, *and was in no wise, in the nature of an action taken pursuant to, or under the provisions of the judgment.*

2. There was no judicial sale under the State Court's original decree dismissing the bill. Hence,

neither Eschmann, his wife, McDowell, Engelhard or the Engelhard Co. can claim protection under the rules applicable to purchasers at judicial sales.

Putting then to one side cases of purchasers *under* judicial sales (where for reasons of public policy judicial sales are protected even in the event of reversal, 96 Am. St. Rep. 136 note), the law is well settled that even if a *bona fide* purchase, for value, is made after an appeal is taken, the purchaser's title *remains subject* to the final decision of the Appellate Court; and hence his title is lost if that results in a reversal. (See *Kirkland* v. *Trott,* 75 Ala. 321; *Real Estate Sav. Co.* v. *Collonious,* 63 Mo. 290; *Carr* v. *Cates,* 96 Mo. 271, 274; *Dunnington* v. *Elston,* 101 Ind. 373, 375; *Debell* v. *Foxworthy,* 9 B. Mon. 228; *Clark* v. *Farrow,* 10 B. Mon. 446; *Clarey* v. *Marshall,* 4 Dana, 95; *Martin* v. *Kennedy,* 83 Ky. 335; *Cook* v. *French,* 96 Mich. 525; *Lord* v. *Hawkins,* 39 Minn. 73, 76; *Smith* v. *Burns,* 72 Miss. 966; *Harle* v. *Langdon,* 60 Tex. 555.)

The reason for the rule is thus stated in the old Kentucky case of *Clarey* v. *Marshall,* 4 Dana, 95, 98, with a force that cannot be improved:

> "It has often been decided, that a *bona fide* purchaser under a decree or judgment, may, if the court had jurisdiction, hold the thing so purchased, notwithstanding a subsequent reversal of the judgment or decree for error or irregularity. But neither Edmonson, nor his vendees, can be protected by the principle of this judicial doc-

trine. That principal is one of supposed public policy altogether.

"As those who may be expected to purchase at judicial sales cannot be presumed to know whether (the court having jurisdiction) the judgment or decree is erroneous and may be reversed, and as it is a matter of great public concern, that persons disposed to buy property at such sales, should bid with confidence in the effectiveness of the sale, and should be protected by the law, whose interpreters and ministers invited them to buy—it has been deemed better, as a general rule, that such sales should not be frustrated, so far as the purchaser may be concerned, by a subsequent reversal of the judgment or decree; and that the person whose property was sold, rather than such a purchaser, should give it up.

"But none of this reasoning applies to this case. Edmonson was no purchaser under the decree in his favor. The decree itself erroneously gave him that to which he was not entitled; and, the subsequent modification of that decree necessarily divested him of all semblance of title derived *only* from the decree.

"Nor do his vendees stand in the attitude of purchasers under a judgment or decree of court. They voluntarily bought of him that to which he had an *ostensible judicial right;* but they had bought it, not under the authority or at the instance of a court or any officer of the law, and certainly took it—as *his* title—on *his* responsibility, and subject to all the contingencies to which the title of a vendor is ever liable. They bought only his right. They bought it from *him,* and could not have acquired, thereby, a better or any other right than he had. His right was liable to defeasance; this they must have known, or should be presumed to have understood. *His title has been defeated;* and therefore, *theirs* which was only derivative and depended *entirely* on *his,* must also have failed at the same instant. After his

> right had been transferred to them they stood precisely as he would have stood had he never conveyed his interest to them. And, of course, when the decree, which was the only foundation of his and their title, was annulled, no title remained in them."

As there, so here. Eschmann had an "ostensible" title to the stock. But with Mackenzie asserting a title or claim thereto, if the corporation, with notice, undertook to decide between those conflicting claimants, it did so at its peril, and took the chance that always follows of "guessing wrongly" as to the rights of conflicting claimants.

Consequently, when the judgment awarding the stock to Eschmann was reversed, he lost his title, and those (Mrs. Eschmann, McDowell and Engelhard) who took title from him with full knowledge or without value, also lost their title.

This is because of the doctrine of *lis pendens*. This Court and the Kentucky Court of Appeals both hold that an appeal is a mere continuation of the original suit, so that the *lis pendens* established by the suit continues until the expiration of the time for appeal; or, in the event of appeal, until the final disposition of the case by the Appellate Court.

Indeed, no Court has gone further than the Kentucky Court of Appeals in holding that if the title of a grantor is subject to divestiture by reversal, so must the title of his grantee be similarly divested in cases of reversal; and that the rule protecting purchasers under judicial decrees is,

for reasons of public policy, an *exception* to the normal rule, and is not to be extended beyond that special case. (Cases cited, p. 28, *supra.*)

In *Golden* v. *Riverside Coal & Timber Co.,* 184 Ky. 200, 205, the cases cited were approved, and the reason for the decision thus stated:

> "An appeal is usually held to be a continuation of the action, and not a new action, and one who knows of the pendency of the suit and the rendition of the judgment is presumed to know, that an appeal may be taken from the judgment within the time prescribed by law. The Riverside Coal & Timber Company had actual knowledge of the suit, the subject of controversy, and the rendition of the judgment, at the time, it made its purchase. It was a *pendente lite* purchaser, which is a purchaser, with knowledge of the subject of the controversy and the claims of the litigants. Such a purchaser from one of the parties to the action takes the property subject to the results of the litigation, and holds it, with no more rights therein, than his vendor, so far as his purchase affects the rights of the successful litigation [citing many cases]. A *pendente lite* purchaser is bound by the judgment if rendered against the party from whom he purchased [citing many cases]."

The foregoing quotation disposes of most of the arguments advanced by the Engelhard Company.

A striking illustration of the extent to which the Kentucky Court of Appeals has gone is shown in *Webb* v. *Webb's Guardian,* 178 Ky. 152, where, while reaffirming the doctrine as to judicial sales, the Court said (p. 160):

> "Further, limiting the doctrine to the demands of public policy, it has been continuously held, that when property has been obtained under the judgment of a court, without the intervention of a *sale* by a commissioner, the parties, who obtain the property and their privies, are *pendente lite* purchasers, and in the event of a reversal of the judgment, may be required *to return* the property *or its value* to the owner."

And after further considering the general rule protecting purchasers at judicial sales, it was said:

> "The hard and inflexible rule, above stated, has been changed, to the extent, that, if the purchaser at a judicial sale, either under execution, or a decree, is a party to the record who procured the erroneous judgment, *or his attorney*, or assignee before the sale, when it is reversed upon appeal, if the property sold is in the hands of such party, he may be required to make restitution of the property, and if not, he can be made liable for its value or at least all, which he received from the sale."

3. The Engelhard Co. cites *Fidelity Trust Co.* v. *Louisville Banking Co.,* 119 Ky. 675; *Langley* v. *Warner,* 3 N. Y. 327; *Bank of United States* v. *Bank of Washington,* 6 Pet. 19, and *Insurance Co.* v. *Clark,* 203 U. S. 75.

The cases are not in point.

In the *Langley* and *Bank of United States* cases, a plaintiff recovered judgment against a defendant, execution was issued and the money collected thereon by the plaintiff, who then, in due course, paid the money so collected to his own creditors. Subsequently the original judgment

was reversed, and the defendant, in seeking restitution of the money he had erroneously paid to the plaintiff, endeavored to collect it from the plaintiff's *creditors* to whom it had been paid. It was correctly held that so long as the judgment remained in force, the collection by the original plaintiff of the money from the defendant was perfectly valid and binding, and thus having a valid title to the money so collected, he was entitled to pay his debts with it, even though his creditors knew how he had obtained the funds. The plaintiff was, of course, liable personally to restore the money to the defendant, but his *creditors* were not required so to do.

The *Fidelity Trust Co.* case was substantially similar. The plaintiff was adjudged a lien on a fund in Court, and under orders of the Court (instead of execution) received the money which he then paid to his *creditors*. The judgment being reversed, it was held that the persons entitled to the money could not recover it from the *creditors* to whom it had been paid.

The Kentucky Court of Appeals had no intention of overturning the long line of previous decisions holding that a purchaser of property from one whose title rests upon an unsuperseded judgment that is reversed after the purchase, is automatically divested of his title; and the basis of this particular decision was the difference between money and property, as is shown by its subsequent reaffirmation, in *Webb* v. *Webb* and *Golden* v.

Riverside Coal & Timber Company, of the general rule that a reversal *does* divest the title of one who has purchased from the successful party pending the appeal.

If any Kentucky or Federal cases to the contrary are cited, it is believed that every one will be found to be an instance where the purchaser (1) acquired his title *at* a judicial sale, or (2) acted in *obedience to an express command* of a judgment for the payment of money, or for the performance of some other act. See also *Phelps* v. *Elliott,* 35 Fed. 455, 460, where it is said:

> "Except as to such purchasers [at a judicial sale] the rule is that all persons who rely upon appealable decisions must take the risk of the ultimate decision [citation omitted]."

Money is very different from corporate stock. A creditor receiving payment out of money lawfully in the plaintiff's hands, occupies a very different position from a corporation who choses to transfer corporate stock upon its books at the request of an ostensible owner, with full knowledge that another person is claiming title thereto.

In the *Clark* case, a plaintiff recovered judgment against an insurance company which, without even the issuance of an execution, paid the amount into Court from which it was disbursed to the plaintiff and her attorneys. Subsequently the insurance company brought suit against the plaintiff, and the persons who received the money, to recover it upon the ground that the judgment was

obtained by the plaintiff's fraud. It was held that the company could recover the money from the fraudulent plaintiff, but not from the persons to whom the plaintiff had paid it in satisfaction of valid claims. The Court said (203 U. S., at p. 73):

> "It is said that the title of the appellees [lawyers] stands on the judgment, and that if the judgment fails, the title fails. But that mode of statement is not sufficiently precise. The judgment can hardly be said to be part of the appellee's title. It simply afforded the appellant [insurance Company] a motive for its payment into court. The appellees [lawyers] derived their title immediately from Mrs. Mettler [fraudulent plaintiff], and *remotely* from the act of the appellant [insurance Company]."

In other words, the point of that case was that as the fraudulent plaintiff got, by the judgment, a good title for the time being to the money, in paying the money to her lawyers, their title did not depend upon the judgment at all, but merely rested upon the relation of debtor and creditor, and that hence the ultimate setting aside of the judgment for fraud (while the plaintiff if solvent could be required to restore the money), did not require her creditors to restore that which she had paid to them.

The decisions in those four cases were based upon the well established rule (2 R. C. L. 273) that

> "Where by virtue of a judgment a party in whose favor it was rendered receives money, which he subsequently pays over to his creditors,

upon reversal the latter cannot be required to make restitution."

But while fully conceding the validity of that proposition, it is not in point. If Eschmann had withdrawn money from Court and paid it to his creditors, they would have had an unassailable title thereto, even if the judgment had subsequently been reversed.

But that is not the case here.

The judgment merely gave him possession of a certain stock certificate. It did not thereby lessen the obligation of the corporation not to transfer that stock upon its books except at its own peril, when it had notice that there was an adverse claimant thereto. In such a case it is a principle of corporate law that the corporation must be sure as to the person who is rightfully entitled to the stock (p. 40, *infra*).

The defect in the argument for the Engelhard Co. is that it assumes (1) that what the Engelhard Co. did was *under and pursuant to,* and consequently *protected by* a judgment of the Court, *whereas,* what the Engelhard Company did was as a pure *volunteer,* because it chose to assume that the judgment would never be reversed; and (2) that the Engelhard Company was under no necessity of requiring an indemnity bond from Eschmann to protect it against a possible reversal, *whereas,* it is a commonplace of financial life, that corporations will not transfer stock where there are conflicting claimants, unless the corporation is

protected against the possibility of a claim against itself.

4. In response to the Engelhard Co.'s contention that it was not a party to the State Court suit at the time of the original judgment, and hence was not bound by the consequences of a reversal, it is sufficient to reply: (*a*) the rule of *lis pendens* is most frequently invoked against a stranger to the litigation, who has *knowledge* thereof; (*b*) the Engelhard Company was originally a party to the suit; it *procured* its own dismissal therefrom upon the ground that it was *not* a proper party, and that Mackenzie could not make it a party to the suit until he had first established his right to the stock; the trial Court sustained the Engelhard Co.'s contention that it "cannot be proceeded against until plaintiff becomes the owner of a certificate and a new certificate in his name is demanded by him and refused by the Engelhard Company (R. 16)," which is precisely the course Mackenzie pursued. Having procured that ruling, the Engelhard Co. is now estopped from claiming that it should have been a party to the suit or that Mackenzie should have pursued some other course. (*Doniphan* v. *Bill*, 1 B. Mon. 199, 200; *Taylor* v. *Cook*, 136 Ala. 354, 378-9; *Kelly* v. *Norwich Co.*, 82 Ia. 137, 141.)

SECOND POINT.

The Engelhard Company was liable to Mackenzie for refusing to transfer to him the 130 shares of stock.

Both the District Court (R. 33-36), and the Circuit Court of Appeals (R. 42-44), held that the Engelhard Company was liable to Mackenzie. The *extent* of that liability will be considered hereafter (pages 40, 45).

Mackenzie, having acquired title to the stock, was entitled to demand a transfer thereof on the company's books, and when it refused, he could maintain an action, in equity, to compel a transfer of the stock to him and an accounting for dividends paid since he became the owner. (*St. Romes* v. *Cotton Press Co.*, 127 U. S. 614; 14 Corpus Juris, 757, §1158; *Cushman* v. *Thayer Mfg. Co.*, 76 N. Y. 365, 368-370; *Mundt* v. *Commercial Nat. Bank*, 136 Am. St. Rep. 1023 and monographic note, pp. 1030, 1035, 1039; *Citizens Nat. Bank* v. *State*, 45 L. R. A. (N. S.) 1075, and elaborate note, pp. 1080-1082; see also *Leurey* v. *Bank*, Ann. Cas. 1913 E, pp. 1174-1176, note and cases there cited; 4 Pomeroy's Eq. Jur., 3rd Ed., §1412, note.)

The law in Kentucky is to the same effect (*Bank of Ky.* v. *Winn*, 110 Ky. 140; see also the important case of *Ramage* v. *Gould*, 176 Cal. 746.)

To a suit of that kind, the corporation (Engelhard Co.) is the only necessary party; and third persons (Mrs. Eschmann or McDowell) claiming to hold certificates for the same stock are not nec-

essary parties. In *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, a corporation in 1853 transferred the widow St. Romes' stock to a third party. In 1876 her daughter brought suit in a Louisiana State Court against the corporation to recover the dividends. The Court dismissed the suit because the then holders of the stock, who had received the dividends, were not made parties. In 1882 she sued the corporation alone to compel the issuance of a stock certificate and to recover the dividends for the past thirty years and the Supreme Court, in sustaining her right, said (p. 619):

> "If the Supreme Court of Louisiana was right in dismissing the suit for want of proper parties, the present suit is obnoxious to the same objection. * * *
>
> "But *was* the Louisiana court right in its conclusion as to necessary parties? If a corporation has by negligence cancelled a person's stock, and issued certificates therefor to a third party who has purchased it from one not authorized to sell it, is the true owner bound to pursue such purchaser, or may he directly call upon the corporation to do him right and justice by replacing his stock, or paying him for its value? The weight of authority would seem to be in favor of the latter alternative. See *Telegraph Co.* v. *Davenport*, 97 U. S. 369; *Loring* v. *Salisbury Mills*, 125 Mass. 138; *Pratt* v. *Taunton Copper Co.*, 123 Mass. 110; *Pennsylvania Railroad Co.'s Appeal*, 86 Penn. St. 80; *Loring* v. *Frue*, 104 U. S. 223; *Salisbury Mills* v. *Townsend*, 109 Mass. 115."

To the same effect is *Skinner* v. *Ft. Wayne R. Co.*, 58 Fed. 55, 58.

Consequently, Mackenzie did not have to make Mrs. Eschmann or Mr. Engelhard, now holders of the new certificates, parties to the present suit.

We submit:

I. *When a corporation knows that there are rival claimants to a certificate of stock, which controversy is in litigation, it acts at its peril in deciding between them: and if the corporation "guessing wrong" as to which will ultimately have the better title, it is responsible to the rightful owner.*

In 1 Machen's Modern Law of Corporations, §935, after discussing at length a corporation's duty to transfer stock presented to it. and its obligation to see that the stock is only transferred to the real owner thereof, the learned author says:

> "Sec. 935. *Company in Dilemma when disputed Transfer presented for Registration—Interpleader.*—When a transfer of shares is presented for registration, the company is in a strait betwixt two. If the company refuses to register the transfer and the refusal turns out to have been wrongful, the company may be held liable, according to the principles stated above. If, on the other hand, it registers the transfer, and afterwards the fact transpires that the transfer was forged or otherwise invalid, the company is then liable to the true owner of the shares. *Accordingly, if the company is in doubt whether a transfer ought to be registered or not, a bill in the nature of a bill of interpleader may be filed against the various claimants;* but if the company decided the question for itself and registers the transfer, it cannot subsequently file a bill to re-

quire the claimants to interplead. * * * If his [true owner] name is improperly stricken from the register in pursuance of a spurious or otherwise invalid transfer, he may compel the company to restore his name, probably by a writ of mandamus at law, and certainly by bill in equity. * * * In a New York case, it was said that if the company should be unable to restore the shares, it might be compelled to pay their value, but it would seem always to be legally possible to restore the shares by cancelling the entry of the transfer. * * *

"In addition to this relief, the true owner of the shares may require the Company *to pay him any dividends* which were payable while his name was erased from the register, and which were paid to the person whose name was wrongfully substituted. * * *

"Sec. 937. As an alternative to these remedies the true owner of the shares may elect to treat the registration of the forged or otherwise invalid transfer as a conversion of his shares by the Company, and may accordingly sue the Company for damages."

Here is a case directly in point:

In *Miller* v. *Doran,* 245 Ill. 200, Mrs. Doran owned shares of stock in the United States Steel Corporation, which she had endorsed in blank. Without her knowledge her husband pledged them with Miller & Co. for his own speculations. Miller & Co. sent the stock to the Steel Corporation for transfer. Mrs. Doran found it out and notified the Steel Corporation not to transfer the stock.

Thereupon Miller & Co. filed suit against Mrs. Doran and the Steel Corporation to establish its ownership to the stock and get it transferred. The lower Court decided that the stock belonged to

Miller & Co. Before Mrs. Doran appealed, Miller & Co. by a writ of replevin got possession of the stock from the Steel Corporation and returned it to the Steel Corporation, which transferred it to Miller & Co., and it was sold to third parties.

Subsequently Mrs. Doran perfected her appeal and got a reversal of the case, where, on a second trial it was held that the property belonged to Mrs. Doran and that the Steel Corporation must deliver the stock to her or pay her the value thereof.

The Steel Corporation appealed, claiming that they had transferred the stock to Miller & Co.,

> "while the first decree of the Circuit Court was in full force and effect and *before* that decree had been reversed, and that they are protected from all liability to Birdie Doran growing out of the transfer and surrender of said stock to L. D. Miller & Co. by the first decree entered in this case" (p. 203).

The Court held against the Steel Corporation upon two grounds:

First: That its transfer of the stock to Miller had not been by virtue of any *command* in the decree below, but that they had transferred it simply because Miller & Co. had presented the stock to the Steel Corporation for transfer.

The Court said (p. 204):

> "If said corporations did transfer said stock to any other person than Birdie Doran or her assignee upon the stock books of the United States Steel Corporation while said decree was subject to review and reversal, *they took their chances of said decree being reversed.*"

Second: That the original decree in favor of Miller & Co. had been *reversed.*

The Court said (p. 205):

> "It is also contended that Birdie Doran should be barred from any relief as against the corporations, on the ground that she did not immediately, by appeal or by writ of error and a *supersedeas* stay proceedings in the trial Court until she obtained a review of said decree.
>
> "A sufficient answer to this contention (regardless of the fact whether or not the corporations could have had said decree reviewed by appeal or writ of error) is, that the corporations did not make the transfer of said stock or deliver the same to L. D. Miller & Co. by reason of the *command* contained in said decree remaining in force and because it had not been stayed by an appeal or writ of error and *supersedeas,* as said transfer and delivery of said stock were made by the corporations to L. D. Miller & Co. upon the request of Louis G. Bostedo [one of the partners] after he had obtained the possession of said stock by a writ of replevin—that is, Louis G. Bostedo obtained the possession of said stock from the corporations by a writ of replevin and then immediately returned the stock to the corporations, and the stock was then transferred upon the stock books of the U. S. Steel Corporation by the corporations and delivered to L. D. Miller & Co. who were by such action placed in a position where they could transfer the stock to innocent parties and deprive Birdie Doran of her stock. These facts, we think, make the corporations liable to Birdie Doran to deliver to her her stock or its equivalent, or to pay to her the value thereof."

So here, the Engelhard Co., not acting under any command of the Court,* nor in any effort to see that the true owner got the stock, but in a volunteer desire to help its President's sister and brother-in-law, it on request, and without notice to Mackenzie (but whether it took indemnity or not is undisclosed), attempted to transfer the stock and put it beyond Mackenzie's reach, even if he should reverse the lower Court's decree under which Eschmann temporarily got possession of the certificate. It was a purely voluntary act by the Engelhard Co.

When, on February 20, 1915, Eschmann requested the Engelhard Co. to transfer the stock, it was both its right and duty to refuse to transfer the stock pending the final determination of the litigation (Note to 136 Am. St. Rep. 1031 (*c*), 1033 (*d*)).

The Engelhard Co. had an easy means under the authorities cited (p. 40, *supra*) of completely protecting itself—either to interplead or to refuse to transfer the stock until the appeal was decided, or to demand an adequate bond of indemnity before transferring the stock (see also note to *O'Neil* v. *Wolcott Mining Co.*, 174 Fed. 527, 27 L. R. A. (N. S.) 200, at p. 201; *Mundt* v. *Commercial Nat. Bk.*, 136 Am. St. Rep. 1023, 1030 1 note, 7 R. C. L., p. 268). It did none of them, but elected to take sides with Eschmann and it must now take its medicine.

*As to which a different rule might prevail. 2 Cook on Corp., §361.

II. *A corporation is bound, at its peril, to avoid the issuance of certificates of its shares (in lieu of surrendered certificates) to anybody but the true owner; and in event that it issues new certificates to one not the true owner thereof, the true owner is entitled to maintain a suit in equity against the corporation to compel the issuance of new certificates to him, or, in the alternative, to recover the value of his stock.*

Before Mackenzie commenced his original suit he notified the Engelhard Co. that the stock had been pledged to him. The Engelhard Co. was kept fully advised of Mackenzie's claim to the stock "throughout the progress of the litigation both in the lower Court and in the Court of Appeals" (R. 3); and Mackenzie's valid lien upon the stock was established by a Court having personal jurisdiction of the parties and is beyond question (*Black* v. *Zacharie*, 3 How. 483, 513).

The law is abundantly settled that a corporation assumes, as a part of its corporate duties, the entire burden of ascertaining the true ownership of stock before it issues a new certificate in the place of one which is surrendered for cancellation.

In *Telegraph Co.* v. *Davenport*, 97 U. S. 369, 372, the true owner of stock which had been abstracted from her safety deposit box by a trusted relative, surrendered to the corporation by means of forgery of her signature (which he witnessed as genuine) sued the corporation, in equity, to compel the issuance to the complainant of a new cer-

tificate in the place of the one surrendered, and to pay the back dividends, or to pay the complainant the value thereof. The Supreme Court said:

> "The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires in the cases mentioned that the property wrongfully transferred or stolen should be restored to its rightful owner."

Should an attempt be made to distinguish the foregoing case from the case at bar, upon the ground that the certificate of stock in that case was feloniously stolen, while in the case at bar it was surrendered to Eschmann under an order of

Court which was subsequently reversed, the attempted distinction must fail, because the reason, in the case of the stolen certificate, is the identical reason which we rely upon in this case, to wit, in both cases the true owner has been deprived of the evidence of his ownership of the property, without his assent or negligence, and the adverse claim is founded upon a wrong inflicted upon the true owner. The deprivation of the evidence of ownership without the assent or negligence of the true owner, is the basis of his right, and not the particular *means* by which that deprivation has been produced.

In *Moores* v. *Citizens National Bank,* 111 U. S. 156, the attitude of the parties was the reverse of their attitude in the case at bar. The plaintiff there was the person to whom had been wrongfully issued shares of stock in the place of shares of stock which the true owner had conveyed to another. The case was the same as if Mrs. Eschmann and Mr. McDowell sued to compel recognition by the Engelhard Company of their rights as stockholders by reason of the issuance of such new certificates. The complainant was denied relief, upon the ground that it is the *true owner,* and not the later person holding the fictitious evidence of title, whose title should be recognized. The Court said:

> "When a corporation, upon the delivery to it of a certificate of stock with a forged power of attorney purporting to be executed by the rightful owner, issues a new certificate to the present

holder, who sells it in the market to one who pays value for it, with no knowledge or notice of the forgery, the corporation is doubtless not relieved from its obligation to the original owner, but must still recognize him as a stockholder, because he cannot be deprived of his property without any consent or negligence of his. *Midland Railway* v. *Taylor,* 8 H. L. Cas. 751; *Bank* v. *Lanier,* 11 Wall. 369; *Telegraph Co.* v. *Davenport,* 97 U. S. 369; *Pratt* v. *Taunton Copper Co.,* 123 Mass. 110; *Pratt* v. *Boston & Albany Railroad,* 126 Mass. 443. And the corporation is obliged, if not to recognize the last purchaser as a stockholder also, at least to respond to him in damages for the value of the stock, because he has taken it for value without notice of any defect, and on the faith of the new certificate issued by the corporation." See *Bangor* v. *Elec. L. & P. Co.,* 52 Fed. 520; *Citizens St. Ry. Co.* v. *Robbins,* 128 Ind. 449; *Baker* v. *Atlantic Coast Line,* 82 N. C. 146.

The only remaining point is this: What is the *extent* of the Engelhard Co.'s liability to Mackenzie?

THIRD POINT.

Mackenzie is entitled to recover from the Engelhard Co., either:

(1) The 130 shares of stock and all dividends declared since October 30, 1918; or

(2) The agreed value of the stock as of October 30, 1918, plus the dividends subsequently declared thereon.

I.

When on July 15, 1918, Mackenzie bought the 130 shares at the judicial sale, which was duly confirmed on October 30, 1918, he was vested with a good title and was entitled to have the Engelhard Co. transfer it to him. (*St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, and cases cited p. 38, *supra.*)

The Engelhard Co. can be required to cancel on its books the 25-share certificate issued to its President, Mr. V. H. Engelhard, and the 105-share certificate issued to his sister, Mrs. Eschmann; to deliver a new 130-share certificate to Mackenzie and to pay him the dividends on such stock since his purchase, with interest thereon from their respective dates. This is so because Mr. Engelhard and Mrs. Eschmann hold the stock and the company paid the dividends to them, and they collected those dividends with full knowledge of Mackenzie's ownership of the stock.

The fact that Mrs. Eschmann (wife) and Mr. McDowell (attorney) are not parties to this suit, is no ground for denying Mackenzie full relief

(*St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, and cases cited p. 38).

If it be suggested that the Engelhard Co. cannot lawfully issue to Mackenzie a new certificate for 130 shares, while certificates for that amount are outstanding in the hands of Mrs. Eschmann and Mr. Engelhard (McDowell's transferee), it is sufficient to respond that as certificates of stock are not negotiable instruments, the Engelhard Co. can discharge its obligation to Mackenzie by (1) issuing to him the stock and (2) paying the back dividends; and it can then refuse to recognize the stock outstanding in the hands of Mrs. Eschmann and Mr. Engelhard. As they were not purchasers for value and without notice, they have no claim against the Engelhard Co. If the Engelhard Co. cannot recover from them the dividends heretofore paid it, it will lose that amount.

But no matter what the rights are as between the Engelhard Co., on the one hand, and Mrs. Eschmann and Mr. Engelhard, on the other, it cannot affect Mackenzie's right to receive the stock and the dividends.

II.

If, however, this Court should be of the opinion that the Engelhard Co. cannot be required even technically to create an over-issue of its stock while certificates of 130 shares are known to be in existence in the hands of Mrs. Eschmann and Mr. Engelhard, then Mackenzie is entitled to be placed

in as good a position as if he had received the stock.

It is stipulated that the value of the stock was $130 a share; and that dividends of 25% and 18% were declared in 1918 and 1919. It is not shown what dividends were declared in 1921-1924.

If Mackenzie is not to receive the stock itself, he should have a judgment against the Engelhard Co. as follows:

130 shares at $130 per share	$16,930.00
20% dividend (Nov. 30, 1918), *plus* interest to date of decree	3,250.00
18% dividend (Nov. 30, 1919), *plus* interest to date of decree	2,340.00
Such further dividends, with interest thereon, as upon a return of the case to the lower court, shall be ascertained as declared pending this litigation.	

In view of the many years of delay to which Mackenzie has been subjected it would be more equitable to give the stipulated value of the stock *plus* the dividends and interest thereon. (*Bank of America* v. *Macneil,* 10 Bush, 54.)

FOURTH POINT.

The Circuit Court of Appeals erred in limiting Mackenzie's recovery to his original $7500 debt and interest.

The Circuit Court of Appeals held (p. 11, *supra*) that the action of the State Court (1) in decreeing a sale and (2) in confirming the sale made thereunder [without Mackenzie bringing

the corporation in as a party to the suit, *the very thing which Mackenzie had, in the first instance, actually done, and which the State Court, at the corporation's own instance, had decided was improper and dismissed it from the litigation*] produced "a grossly inequitable result," because it permitted Mackenzie not only to own the stock, but after crediting on his debt the $100 paid, left the balance of his claim unimpaired against the judgment-debtor (R. 43); and that the Federal Court, sitting *in equity* (as distinguished from law), had the right to deny to the purchaser some of his legal rights acquired under the State Court's judgment, as a condition of granting him any relief in equity, even though such relief was nothing but a pure money judgment in the nature of damages (R. 42, 44).

Accordingly, the Court of Appeals declined to recognize or to enforce Mackenzie's rights as the *owner* of the stock purchased at the judicial sale; but held that as the corporation, with full knowledge of Mackenzie's lien claim as pledgee of the stock, had, at the pledgor's request, during the pendency of the litigation, and before the decree of sale, transferred the stock, *pendente lite,* to the pledgor's wife and attorney (neither of whom were purchasers without notice), the corporation had wronged Mackenzie and was liable to him, but (*a*) *not* for the *stock* itself, *nor* (*b*) in damages for the *value* of the stock he had purchased, *nor* (*c*) for the *dividends* declared thereon

after the purchase, *but* (*d*) *only* for the original amount of Eschmann's note, with interest, and a part of the costs of the State Court suit—something with which the corporation had no concern and which had been merged in the State Court judgment (R. 44).

If its decision is right, then, whenever a Federal Court shall foreclose a railroad mortgage, sell the property, and by deed convey it to a purchaser, who, desiring to enforce some equitable right arising from the fact of his ownership under such foreclosure decree, brings a suit in a State Court, it leaves the State Court free (under the doctrine now announced) to hold that the Federal foreclosure sale produced "a grossly inequitable result," and to substitute its own views as to what it will give to the purchaser (admittedly less than his rights under the purchase) as a substitute for the rights established by the Federal decree.

Can a Federal Court (because it thinks a State Court judgment produced an "inequitable result"), set up its individual ideas of what constitutes an "equitable result," and can compel a litigant to accept such modified rights, instead of receiving full Federal relief based upon the legal effect of a final decree of a State Court.

The Circuit Court of Appeals, in effect, denied the full faith and credit to the State Court judgment, which by statute it is required to accord (R. S. 905; *Cooper* v. *Newell,* 173 U. S. 555, 567).

In *Yazoo & M. V. R. Co.* v. *Clarksdale*, 257 U. S. 10, there was a sale of 250 shares of railroad stock under an execution issued on a Federal Court judgment. Subsequently, a State Court, sitting in equity, held that the sale was void and that it would compel the purchaser at the Federal Court sale to give up that which he had obtained at the sale and to recognize the original defendant as the owner of the stock. On *certiorari*, this Court held that the Federal Court sale was valid, vested a good title in the purchaser, and reversed the State court.

In the case at bar, the sale took place, not under an execution, but at a *regular judicial sale*, confirmed by the State Court itself; and it was a Federal Court, in equity, which denied the purchaser title to the stock, although it did give him *partial* relief in damages. The Court of Appeals conceded that the sale to Mackenzie was valid and attempted to justify its disregard of the owner's rights by reference to the general equitable principle that the relief granted might be less than the legal rights. It erred in its conception of the function of that principle which cannot properly be utilized to enable a Federal Court to disregard rights and titles acquired under valid State Court decrees, in order to conform such rights and titles to what the Federal Court thinks the State Court *should* have done.

If a Federal Court had sold a railroad under foreclosure, no State Court would be allowed to

disregard the purchaser's title so acquired, and merely grant him a lien for his purchase price, while restoring the property to the original owner, because the State Court felt the Federal decree produced a "grossly inequitable result." As this is a matter of general equitable jurisdiction, a Federal Court has no greater power than a State Court.

ANALYSIS OF THE OPINION OF THE CIRCUIT COURT OF APPEALS.

I. The Circuit Court of Appeals *correctly* assumed that Mackenzie acquired the legal title to the stock at the judicial sale and that "in an action *at law* against the corporation for its refusal to reissue the stock to him *he would be entitled* to recover *full* damages" (R. 42), but the Court *erroneously* holds that as Mackenzie sued the corporation *in equity,* he cannot recover either the stock or full damages, because of what might be termed Mackenzie's *contributory negligence,* which it expressed in the following words (R. 42):

> "On the contrary, while Mackenzie did not directly acquiesce in the withdrawal of the certificates, he *contributed* to create the situation attending the withdrawal, surrender and reissue. To obtain a *supersedeas* would apparently have been no burden and would have avoided all later complications; and while it may be assumed that the lien upon the stock was in law reinstated *ab initio* when the judgment was reversed, yet the intermediate transfer and reissue would not have occurred if Mackenzie had taken the customary precautions to preserve his interests."

COMMENT: There is no justification for the implication that Mackenzie "contributed" to create a difficult situation by neglecting to take "customary precautions."

While Mackenzie could have prevented Eschmann from withdrawing the certificate, by executing a *supersedeas* bond with sureties to respond to all damages, etc., for keeping Eschmann "out of possession by reason of the appeal" (Ky. Code, §748), he did not care to incur the risk of great loss if, for example, Eschmann should subsequently claim he had lost a sale at a fancy price for this "close corporation" stock.

In not superseding, Mackenzie was absolutely within his rights; and his failure to supersede can not properly be made the basis by the Federal Court of a refusal to enforce his rights accorded him by the highest Court of the State when it reversed the erroneous judgment.

The critical language of the Court of Appeals applied to the *innocent* party [Mackenzie], would have been much more appropriately applied to the wrongdoer [Eschmann] and his accomplices, who transferred the stock, with full knowledge of the appeal, *for the express purpose of creating this precise* "situation attending the withdrawal, surrender and reissue."

If any judicial penalty is to be imposed, should it be upon Mackenzie (who was compelled to obey the lower court and permit his security to be taken from him, and who appealed for redress) or upon

those who designedly sought to defeat the effect of the appeal if it should be successful?

II. The Circuit Court of Appeals held that the wrong done to Mackenzie by the Engelhard Co. in issuing the stock to other persons, pending the appeal, did *not* wrong Mackenzie (R. 43),

> "to the *entire value* of the stock, since Mackenzie had therein no interest to be injured except to the extent of his lien."

COMMENT: But the Court of Appeals entirely overlooked the fact that Mackenzie's lien might, if not paid, ripen, *as it did,* into the entire *ownership* of the stock; and that the Engelhard Co.'s wrongful act, if it *deprived* Mackenzie of the *complete enforcement* of his lien into *ownership* of the stock, *did* wrong him to the *full extent* of its value.

III. The Circuit Court of Appeals said (R. 43):

> "In this situation the parties came to the foreclosure sale of the stock. Its value was $17,000, the lien was about $10,000. It was quite evident that no sale could be had at which any fair value could be realized. No counsel would undertake to advise with certainty what title would pass. The books of the corporation showed no interest to sell.* No stranger would pay a substantial price, because he would be buying only a lawsuit. Eschmann and his vendees would not bid, because they were advised, and doubtless in good faith believed, that no title would pass. The actual result was inevitable, viz., that Mackenzie would buy in the

*But Mackenzie did know this.

> $17,000 of stock for a nominal price (he paid $100), and still leave his whole claim against Eschmann for the debt practically unimpaired. This would be and was a grossly inequitable result."

COMMENT: 1. If there was any uncertainty as to the title that would pass at the judicial sale, it was certainly not the fault of Mackenzie, but it was the fault of Eschmann, his wife, his attorney, his brother-in-law, and the "family" corporation, all of whom had combined together to create just such a situation, so as to prevent Mackenzie from collecting his debt out of his security.

The Circuit Court of Appeals, however, visited the penalty upon Mackenzie who had nothing to do with creating the situation, instead of upon the debtor, Eschmann, who had deliberately created the situation to defeat his creditor.

The Court assumes that Mackenzie knew about the transfer to Eschmann's wife and attorney. But in fact Mackenzie knew nothing about it for years afterwards.

The Court's comment that "No stranger would pay a substantial price because he would be buying only a lawsuit," coupled with the further declaration that "the situation could have been easily clarified, and it was Mackenzie's duty to procure that clarification," again leaves a wrong implication, when it is remembered that it was Eschmann's attorney who appeared at the sale, and publicly stated to all bidders that certificate No. 24 for the 130 shares of stock referred to in the

judgment and advertisement of sale, had been cancelled, as the stock had been transferred by Eschmann during his life, and that there was no stock in the Engelhard Co. in the name of Eschmann or his executors and that certificate No. 24 was not then in existence, having been cancelled (R. 19). If any strangers were deterred from bidding, it was the result of the act of Eschmann and the Engelhard Co. acting through their duly authorized attorney.

2. If there was any legitimate doubt as to the title that would pass at the sale, it was no greater difficulty than frequently attends judicial sales, and could have been raised and settled by exceptions to the Commissioner's Report. But the Engelhard Co. and the Eschmanns did not wish any clarification of the situation, but simply wanted, through one device and another, to prevent Mackenzie from collecting his debt.

To that situation might well be applied the language of the same Circuit Court of Appeals (TAFT, LURTON, SEVERENS. J. J.) with reference to another foreclosure sale:

> "It looks very much as if he had dug a pit and was anxiously keeping the pathway to it in good order. Into this pit he has fallen and must there lie" (*Venner* v. *Farmers Loan & Trust Co.*, 90 Fed. 348, 360).

When the Court of Appeals expressed the opinion that Eschmann, his wife, and attorney, would not bid because they doubtless "in good

faith believed that no title would pass," it need only be responded that as between Mackenzie and Eschmann, each were advised by counsel, each was dealing at arm's length with the other, and that there is no reason for a Federal Court to intervene to deprive one party of property which he fairly purchased at public auction at a judicial sale.

While there has been much unjustifiable criticism of Federal Courts endeavoring at times to nullify State Court proceedings, it is believed that the case at bar is one of the few instances to which such criticisms might be justly applied.

IV. The Circuit Court of Appeals, while not mentioning the State Court by name, in effect, severely criticised the State Court for entering the decree selling the stock to satisfy the lien, or, in any event, for actually permitting a sale to take place, declaring that *any sale* of the stock would bring about a "grossly inequitable result" and then added (R. 43):

> "The situation could have been easily clarified, *and it was Mackenzie's duty to procure that clarification before going to sale,* if he expected to seek the aid of a court of equity in enforcing his rights as purchaser.
>
> "An appropriate proceeding could have been taken in the equity court where the case was pending, and probably as ancillary or supplemental to that case, whereby it would have been adjudicated, as between Mackenzie, the corporation, Eschmann and the purchasers *pendente lite,* just what title would pass by the expected sale. After such an adjudication the sale would have been fair to all concerned and all suitable equi-

table enforcement remedies could have been asked without embarrassment."

COMMENT: Probably nothing in the opinion of the Circuit Court of Appeals more clearly indicates (1) not only its *error,* but (2) its *unjustifiable criticism* of Mackenzie and the State Court than this quotation.

The comments of the Circuit Court of Appeals disclose a complete misconception of the facts existing at the time of the foreclosure sale. They place a burden on Mackenzie (who *knew nothing* of the secret transfer of the stock), and completely exonerate Eschmann and his secret vendees (wife and attorney) from any obligation even to disclose their interest, in order to settle what title would pass at the foreclosure sale. The Court of Appeals at more than one place on a single page of its opinion (R. 43), is guilty of an anachronism in assuming that at the time of the foreclosure sale in July, 1918, Mackenzie knew of the secret transfer to the Eschmann's wife and attorney, whereas Mackenzie did not learn it until *nearly three years* thereafter. It was a fact that was most *carefully concealed,* not only by Eschmann, but by the Engelhard Co.

Although the District Judge in two opinions (R. 6, 10) decided that the Engelhard Co. must give an account "of what has been done with 130 shares of stock," and commented on the fact that the Engelhard Co. did not disclose "to whom this certificate was issued nor who is now the holder of

the shares," the Engelhard Co. did not reveal the facts either in its answer (R. 7) or amended answer (R. 11) and the truth was first disclosed in the stipulation of facts (R. 17).

2. Why was it the duty of Mackenzie (rather than of Eschmann) to clarify the situation?

Mackenzie had an opinion of the Kentucky Court of Appeals in his favor. It was apparently the extremely simple case of foreclosing a lien on corporate stock. He was satisfied with the legality of the proceedings and that a sale would pass a good title to the stock, as even the Circuit Court of Appeals now concedes did pass.

At that time Mackenzie *did not even know* that Eschmann had secretly transferred the stock to his wife or attorney, and he never knew of that fact until nearly three years after the sale, when, in the present suit, after repeated efforts, the facts were finally disclosed on March 30, 1921 (R. 6, 10, 17).

If, at the time of the foreclosure sale, Eschmann and his secret vendees really "in good faith believed that no title would pass," it was they who should have procured a clarification of the situation. The wife and attorney could have filed intervening petitions or could have raised the question by exceptions to the report of sale.

3. When Mackenzie originally filed his suit in the State Court upon the note, seeking to enforce his lien on teh stock, he made the corporation, Engelhard Co., a party defendant (R. 15)

(the precise thing which the Circuit Court of Appeals criticised him for *not* doing); and the Engelhard Co. procured its dismissal from the suit upon the ground that it was not a necessary or proper party thereto (R. 15, 16). The State Court expressly decided that "Engelhard & Sons Co. are not a party to the transaction and are *unnecessary* parties to the action. That corporation *cannot be proceeded against* until plaintiff [Mackenzie] becomes the owner of the certificate and a new certificate in his name is demanded by him and refused by Engelhard & Sons Co." (R. 16).

As the State Court, having personal jurisdiction over Mackenzie, Eschmann and the Engelhard Co., decided, at the instance of the Engelhard Co., that it was *not* a proper party to the action and could not be sued until after Mackenzie had purchased the stock at the foreclosure sale and had been refused a new certificate, certainly the Federal Court has now no right to say *that such decision was wrong* and to defeat Mackenzie's claim, upon the ground that he ought to have brought the Engelhard Co. in as a defendant to the State Court suit—the very thing he tried to do and which the State Court held could not be done.

The State Court held that the Engelhard Co. was not a proper defendant to the suit and it was utterly impossible for Mackenzie to have carried out the Circuit Court of Appeals' suggestion that he should have made it a party.

A great injustice was done Mackenzie by the Circuit Court of Appeals, in basing its defeat of his rights, upon the ground that he did not do something which he ought to have done, when, in point of fact, *he did that very thing,* but the State Court held that he had no right to do it—and it was the State Court and *not* the Circuit Court of Appeals which was entitled to decide whether the Engelhard Co. was or was not a proper defendant in the State Court suit.

V. The Circuit Court of Appeals went upon the erroneous theory that, sitting in equity, it had the right to revise the judgments of a State Court (which was equally sitting in equity) by holding that when a plaintiff applies for equitable relief to a Federal Court, that Court can exercise its own judgment as to the relief it will grant, if it thinks that a State Court, in equity, did not decide an equity suit as the Federal Court thinks it should have been decided.

In other words, the Circuit Court of Appeals interprets the maxim, "He who seeks equity must do equity" to mean that a Federal Court in administering equitable remedies can (1) convert them into a pure money judgment and then (2) reduce the sum allowed in such an amount as, in the opinion of the Court, will compensate for the amount of wrong or error committed by another equity Court (State Court) in deciding a case properly before it. That this is not an exaggerated statement of the Circuit Court of Ap-

peals' position may be seen from the following quotation in its Opinion (R. 42, 44):

> "It is fundamental that a plaintiff who does not rely upon his strict legal rights, but asks special relief from a court of equity, subjects himself to the equitable discretion of that Court, and may be denied some measure of his legal rights if to grant them all would be distinctly inequitable. * * * The rule which shapes the relief given by a court of equity in circumstances where equitable considerations make that relief contingent upon plaintiff's acceptance of less than full legal rights, must vary in its application with every case. We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules.
>
> "We therefore conclude that as against the corporation, which in some measure represents its stockholders of record, and for the purpose of the decree which the court below, sitting in equity, ought to have rendered, it must be considered that at the time of plaintiff's demand upon the corporation for a transfer of stock, *he had only a lien for his debt and interest,* so that his measure of damages against the corporation in this equitable proceeding should be *limited* to the amount necessary to discharge such lien. The lien would, we think, include the costs of the State court proceedings up to the time of the decree of the trial court directing a sale, but not thereafter."

COMMENT: 1. The Court of Appeals, ignoring the fact that Mackenzie's lien on the stock had, by the State Court sale, disappeared as a lien and had been converted into a legal title to the stock itself, argued that "at the time of plaintiff's demand upon the corporation for a transfer of

stock," which was many months *after* the sale and the confirmation thereof, he "had only a *lien* for his debt and interest." Is not that a case of a Federal Court absolutely disregarding a State Court judgment and attempting to say that, long after the State Court had wiped out the lien and converted it into a title, that, nevertheless it still remained "only a lien"?

2. If Mackenzie got a valid title to the stock at the sale, his lien ceased to exist, he *owned* the stock, he had a deficiency judgment over against Eschmann's estate, and the Court of Appeals had no right to ignore that legal situation, and to resurrect the lien which was dead.

3. A Federal Court, in equity, is not entitled to decide a case according to its individual ideas of what the result should be, but it is bound by the fixed principles of jurisprudence, one of which is that it must give to the judgment of a State Court, having personal jurisdiction of the parties, the same effect as to the rights arising therefrom, as would be accorded by the judgment in the State where rendered (*Cooper* v. *Newell,* 173 U. S. 555, 567).

4. The Court of Appeals misconceived the nature of the equitable principle invoked by it to justify its disregard of Mackenzie's legal title to the stock, and its award of damages measured by a lien that had ceased to exist.

In *Magniac* v. *Thomson,* 15 How. 281, 300, the Court said:

> "1. That wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim, '*equitas sequitur legem,*' is strictly applicable. * * *
>
> "Equity may be invoked to aid in the completion of a just but imperfect legal title, or to prevent the successful assertion of an unconscientious and incomplete legal advantage; but to abrogate or to assail a perfect and independent legal right, it can have no pretension. In all such instances equity must follow or, in other words, be subordinate to the law."

In *Betzler* v. *James,* 227 Mo. 375, land worth $7,200 was sold at public auction by a Sheriff under a mortgage deed of trust and was bought in for $275. Subsequently the mortgagor who had refused to bid because he felt that no title would pass at the sale because of defective description, endeavored to get relief through a Court of Equity. The Court said:

> "The defendant could have attended the sale, the time and place of which he had full knowledge, and could have bid in the land for the comparatively small amount of the indebtedness and the costs of the foreclosure, but he chose not to do so. No reason has been shown why he could not have attended the sale, or why he could not have made provision for the payment of his indebtedness. The consequences are as much the fruit of his indifference to his obligation on the note as of his inexcusable neglect to protect his property. In the words of the Psalmist: 'He

made a pit, and digged it, and has fallen into the ditch which he made.' The power of a court of equity is not to be exercised to relieve a party or other person from the consequences of his own inexcusable neglect. 17 Am. & Eng. Ency. Law (2d Ed.), pp. 998, 999, and cases cited."

See also: *Old Colony Trust Co.* v. *Medfield St. Ry. Co.*, 215 Mass. 156; *York* v. *Trigg*, 87 Okla. 214; *Osborne* v. *Bank*, 9 Wh. 738, 866.

In *Heyward* v. *Bradley*, 179 Fed. 325, 330, the Circuit Court of Appeals for the 4th Circuit said, in reply to an appeal to its equitable discretion:

"• • • the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what as between the parties would be fair to be done; what one person may consider fair another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. Lord Eldon observes in the case of *White* v. Daman (7 Ves. 35): 'I agree with Lord Rosslyn that giving specific performance is matter of discretion, but that it is not an arbitrary, capricious discretion; it must be regulated upon grounds that will make it judicial. • • •

"This discretion in some cases follows the law implicitly; in others assists in and advances the remedy; in others, again, it relieves against the abuse or allays the rigor of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the Constitution intrusted with.

"• • • It is obvious that in a case of a sale at auction, if the property is sold for an extreme-

> ly inadequate value, it is impossible for the person to repudiate the contract. The mere principle of what might have been fair or what might have been the right thing to do between the parties had all the elements of value been known which have since transpired, cannot be ground for exercising or regulating the discretion of the Court if all the facts which were then in existence were known to both parties. * * *
>
> "That this is a very hard case there is no doubt, and it may be extremely proper that the plaintiff make an abatement in respect of it, but that it is a totally different matter, one which is in the forum of his own conscience, but not one which I can notice judicially."

In the case at bar, the Engelhard Co., Eschmann's estate, his wife and attorney, knew at the time of the sale, every fact that they know now. Mackenzie was the one who was kept in ignorance of all the facts. There is no reason whatever for relief to Engelhard Co. from the consequences of its own deliberate act.

5. Even if the Engelhard Co. desires to avail itself of the maxim that if Mackenzie seeks equity he must do equity, still the Engelhard Co. *must not have conducted itself in such a manner, or have placed conditions and circumstances around Mackenzie, that would make it inequitable for the Engelhard Co. to avail itself of the maxim.*

But for the wrongful act of the Engelhard Co. no damage would have occurred to Mackenzie, and hence no cause of action would have arisen; and to permit the Engelhard Co. to set up this defense would be to give it an unjust advantage

by reason of its own wrong. (1 Story's Equity Jurisprudence, 14th Ed., §74.)

The Engelhard Co., whose president was Eschmann's brother-in-law, committed the first wrong by disregarding its full knowledge of Mackenzie's pending claim, and, combining with Eschmann to defraud Mackenzie, transferred the stock to Eschmann's wife (Engelhard's sister) and attorney (also Engelhard's attorney), from which latter Engelhard himself purchased back the stock so transferred (R. 16, 17).

When the Engelhard Co. injected itself, as a volunteer, into the controversy between Mackenzie and Eschmann, and loaned its aid to assist Eschmann to defeat Mackenzie's lien, it did so at its peril; and when the Kentucky Court of Appeals reversed the judgment, all intermediate transfers to purchasers *mala fides* were vacated, and the Engelhard Co. must bear the consequences of its needless partiality.

CONCLUSION.

A large part of the wealth of the country is represented by corporate stock. Transactions in it are daily and enormous. The pledging of corporate stock for debts is probably the most widespread form of pledge now made.

If a Court having personal jurisdiction of the pledger and pledgee, decrees the sale of corporate stock to satisfy a lien therein adjudged, and a sale thereunder is had, confirmed and a Deed or

Bill of Sale given to the purchaser, is it the law that a Court of another jurisdiction, because it does not approve of the first tribunal's judgment, is free under alleged principles of equity jurisprudence, to decline to enforce the purchaser's rights and arbitrarily *to award him something less,* in order to compensate for the Court's difference of opinion as to the propriety of the first Court's judicial action?

If such is the law, then State courts will have just as much right to refuse to enforce the supposed inequitable results of Federal decrees, as in the present case a Federal Court has exercised that right with respect to a State Court decree.

The Circuit Court of Appeals should not be permitted to substitute its views for those of the State Court as to the nature of the proceedings which should have been taken in the State Court or as to the propriety of the judgment therein rendered.

The decree of the District Court should be reversed with instructions to enter a new decree in favor of Mackenzie against the Engelhard Co., for 130 shares of stock (or its stipulated value), plus all dividends, with 6 per cent interest (from the dates when paid), declared and paid since October 30, 1918.

SAMUEL B. KING,
WM. MARSHALL BULLITT,
Counsel for Louis B. Mackenzie.

30th Sept., 1924.,
Louisville, Ky.